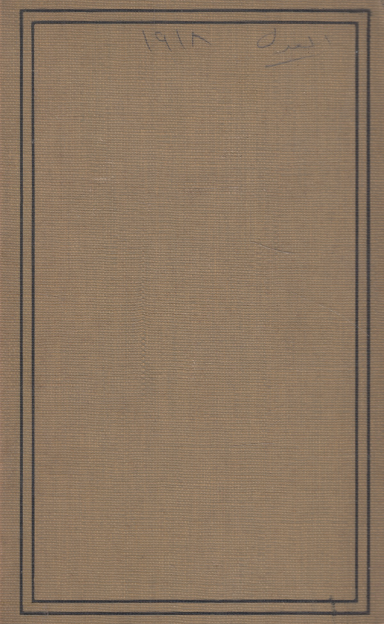

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CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

DECEMBER 6, 1937, TO APRIL 18, 1938

WITH

ABSTRACT OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

REPORTED BY
JAMES A. HOYT

VOLUME LXXXVI

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1938

For sale by the Superintendent of Documents, Washington, D. C. - Price $1.50 (Buckram)

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IN

THE COURT OF CLAIMS

December 6, 1937, to April 18, 1938

GRACE M. EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, TRUSTEE FOR THE STOCKHOLDERS OF MECHANICS MACHINE COMPANY v. THE UNITED STATES

[No. J–24. Decided December 6, 1937. Judgment entered May 2, 1938.]

On the Proofs

Excise tax; what constitutes an automobile "part" or "accessory."—Where a special type of transmission is primarily designed and adapted for use in connection with an automobile engine, and was in fact used in some instances as a part of an automobile or truck, it does not necessarily follow that such transmission is an automobile part or accessory, under the regulations of the Internal Revenue Department, and in order to make the part taxable it must, under the regulations, be designed for the special purpose of being used as, or to replace, a component part of an automobile. *Universal Battery Co.* v. *U. S.*, 281 U. S. 580, 583; *Milwaukee Motor Products Co.* v. *U. S.*, 66 C. Cls. 295, 302.

Abatement of litigation; state statutes controlling.—Under the Illinois law, as well as under R. S. where a corporation has brought suit within the two-year period prescribed by the statute for winding up its business, it may be prosecuted to judgment after the expiration of the period. *Oberndorfer* v. *U. S.*, 65 C. Cls. 376; *B. & O. R. R. Co.* v. *Joy, Admr.*, 173 U. S. 226, 229, cited.

Substitution of trustee.—Trust may not be permitted to fail for want of a trustee; an executor or administrator may continue an action if under the Illinois law a trustee successor has not been appointed.

Laches.—Where the defense has not been prejudiced thereby, and by proper action proceedings could have been hastened, laches in application for substitution of plaintiff is no defense.

The Reporter's statement of the case:

Mr. George M. Morris for the plaintiff. *Morris, KixMiller & Baar* were on the briefs.

Mr. John W. Blalock, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson, Fred K. Dyar*, and *Mrs. Elizabeth B. Davis* were on the brief.

The court made special findings of fact as follows:

1. Mechanics Machine Company, at all times hereinafter mentioned up to September 24, 1930, was a corporation organized and existing under the laws of the State of Illinois. The company, between January, 1921, and March, 1926, was engaged in the manufacture and sale of transmissions and parts therefor and of universal joints and parts therefor.

On July 30, 1928, the directors and stockholders of Mechanics Machine Company, at duly constituted meetings thereof, voted to dissolve the corporation and transferred and assigned to the then President, Eric S. Ekstrom, all the assets of Mechanics Machine Company, including the claims against the United States for refund of excise taxes hereinafter referred to, for the purpose of having the corporate debts paid and the remaining assets liquidated and distributed to the stockholders of the company. Mechanics Machine Company did no business after July 30, 1928, and its charter was forfeited on September 24, 1930, by the State of Illinois, it having failed to comply with the State statutes as to filing of annual reports and neglected to pay its franchise tax and penalties assessed against it. Eric S. Ekstrom paid all the debts of Mechanics Machine Company out of the property assigned and transferred to him, and liquidated and distributed to the stockholders all the assets of the company except the claims for refund herein sued upon for excise taxes paid by the company. Eric S. Ekstrom continued up to the date of his

death on January 12, 1936, to be the liquidating trustee. Grace M. Ekstrom, widow of the late Eric S. Ekstrom, was appointed administratrix of his estate on January 20, 1936, and was substituted as party plaintiff herein by order of this Court dated August 17, 1936.

2. Mechanics Machine Company paid, as excise taxes under Section 900 of the Revenue Acts of 1918 and 1921 and Section 600 of the Revenue Act of 1924, certain amounts to the Collector of Internal Revenue for the first Illinois District. These payments, the dates thereof and the periods for which made, are classified below in two groups: (a) the payments made upon sales of complete "Jumbo" transmissions, and (b) the payments made upon sales of parts for "Jumbo" transmissions, of complete universal joints, and of parts for universal joints:

Period	Date Paid	Tax Paid on Complete "Jumbo" Transmissions	Tax Paid on "Jumbo" Transmission Parts, Complete Universal Joints, and Universal Joint Parts	Total Tax Paid
Jan. 1921	2/19/21	$2.50	$33.24	$35.74
Feb. "	3/30/21		24.33	24.33
Mar. "	4/20/21		48.72	48.72
Apr. "	8/9/21		68.70	68.70
May "	6/29/21		39.28	39.28
June "	7/19/21		96.79	96.79
July "	9/29/21		79.26	79.26
Aug. "	9/29/21		89.26	89.26
Sept. "	10/22/21		154.43	154.43
Oct. "	12/6/21		48.83	48.83
Nov. "	12/30/21		20.01	20.01
Dec. "	1/18/22		35.99	35.99
Jan. 1922	2/28/22		31.54	31.54
Feb. "	4/6/22		30.20	30.20
Mar. "	4/29/22		67.10	67.10
Apr. "	5/25/22		150.50	150.50
May "	7/8/22		65.05	65.05
June "	8/3/22		65.54	65.54
July "	9/7/22		141.48	141.48
Aug. "	10/7/22		94.64	94.64
Sept. "	12/7/22		94.38	94.38
Oct. "	11/28/22		137.34	137.34
Nov. "	12/30/22		82.08	82.08
Dec. "	2/1/23		56.28	56.28
Jan. 1923	3/22/23		48.67	48.67
Feb. "	4/10/23		38.17	38.17
Mar. "	5/8/23	129.37	64.77	194.14
Apr. "	6/12/23	107.89	89.54	197.43
May "	7/18/23	189.99	163.47	353.46
June "	7/31/23	962.33	132.41	1,094.74
July "	9/14/23	15.75	151.48	167.23
Aug. "	10/19/23		91.79	91.79
Sept. "	11/7/23	743.23	169.44	912.67
Oct. "	12/6/23	422.51	200.12	622.63
Nov. "	1/16/24	886.48	143.50	1,029.98
Dec. "	2/9/24	620.12	102.17	722.29

Reporter's Statement of the Case

Period	Date Paid	Tax Paid on Complete "Jumbo" Transmissions	Tax Paid on "Jumbo" Transmission Parts, Complete Universal Joints, and Universal Joint Parts	Total Tax Paid
Jan. 1924	5/12/24	$1,079.66	$240.02	$1,319.68
Feb. "	4/18/24	1,538.32	179.07	1,717.39
Mar. "	5/3/24	1,522.54	268.79	1,791.33
Apr. "	6/6/24	2,897.60	310.54	3,208.14
May "	7/12/24	5,522.78	357.49	5,880.27
June "	8/6/24	3,025.63	400.65	3,426.28
July "	9/6/24	962.84	93.39	1,056.23
Aug. "	9/26/24	935.02	213.88	1,148.90
Sept. "	11/19/24	709.26	78.39	787.65
Oct. "	12/5/24	777.99	[1] 163.87	614.12
Nov. "	12/29/24	1,346.36	[1] 46.48	1,299.88
Dec. "	12/29/24	865.01	[1] 148.77	716.24
Jan. 1925	2/28/25	1,111.06	60.31	1,171.37
Feb. "	3/30/25	1,721.16	106.18	1,827.34
Mar. "	5/4/25	2,585.49	200.52	2,786.01
Apr. "	6/2/25	2,155.73	116.32	2,272.05
May "	7/1/25	2,611.73	176.71	2,788.44
June "	8/4/25	573.93	167.75	741.68
July "	8/26/25	2,795.75	32.77	2,828.52
Aug. "	10/13/25	2,502.44	275.53	2,777.97
Sept. "	11/3/25	6,903.33	126.56	7,029.89
Oct. "	12/2/25	524.88	166.24	691.12
Nov. "	1/5/26	926.56	160.88	1,087.44
Dec. "	2/26/26	996.33	150.50	1,146.83
Jan. 1926	2/26/26	1,240.17	106.32	1,346.49
Feb. "	4/3/26	549.22	144.35	693.57
		52,460.96	6,924.54	59,385.50

[1] Credit.

Payments as taxes were made by Mechanics Machine Company upon sale of all universal joints and parts therefor (except upon universal joints and universal joint parts sold to automobile manufacturers; these buyers supplied with their orders tax exemption certificates) and upon the sale of all "Jumbo" transmissions and parts therefor. There is no showing as to what portion of the $6,924.54 set out in the fourth column of the schedule was paid on *complete* Universal joints as distinguished from taxes paid on *parts* of transmissions and *parts* of Universal joints.

3. On April 4, 1925, Mechanics Machine Company filed with the Collector of Internal Revenue for the first Illinois District, claim for refund of $4,933.60 paid as taxes upon the sale of universal joints, universal joint parts and transmission parts sold between January 1921 and December 1924, both months inclusive. This claim was allowed by the Commissioner of Internal Revenue and paid by the

Disbursing Clerk of the Treasury Department in the amount of $4,876.03, with interest in the amount of $819.45.

4. On April 4, 1925, Mechanics Machine Company filed with the Collector of Internal Revenue for the first Illinois District claim for refund of $25,263.18 paid as taxes upon the sale of complete "Jumbo" transmissions sold between January 1921 and December 1924, both months inclusive. This claim was rejected by the then Commissioner of Internal Revenue, on August 19, 1925.

5. On August 9, 1926, Mechanics Machine Company filed with the Collector of Internal Revenue for the first Illinois District, claim for refund of payments made as taxes, between January 1925 and February 1926, both inclusive, in the amount of $20,984.78 upon the sale of "Jumbo" transmissions, and in the amount of $1,990.94 upon the sale of "Jumbo" transmission parts, complete universal joints and parts therefor. This claim was rejected by the then Commissioner of Internal Revenue on October 7, 1927. However, in adding the monthly tax payments, an error appears in the total of column 3, page 9, of plaintiff's Exhibit 6. The total should have been $27,197.78 instead of $20,984.78.

6. The mechanical principle of the universal joint, although not the particular type here under consideration, has been in use since the Tenth Century. A universal joint seems essential in all machinery where power is transmitted between two planes that vary in level. It operates as a flexible coupling and permits motion at various angles in more than one direction while transmitting power from a driving member to a driven member. Its utility depends on the particular size and shape of the extremities for meshing with the drive shaft on one end and the driven shaft on the other, whether they be of the flange, screw cap, keyway, or spline type. The parts of a universal joint consist of trunnion bearings, housings, yokes, nuts, lock plates, cork washers, ferrules, and spring washers. These several parts could be purchased separately for use on either automobile or non-automobile machinery.

Some universal joints were fitted with flange, some with screw cap, some with keyway, and others with spline fittings. The utility of the universal joint is determined by

the type and shape of the connecting extremity. The spline fittings type was a type customarily used for automobiles but was also used on other machinery. Universal joints used on machine tools were similar in function but not in design. A decided majority of the universal joints disposed of by plaintiff was sold for automobile and truck use.

7. Plaintiff made universal joints in seven sizes, being numbered from 1 to 7, inclusive. The various sizes could be used in any machinery where a universal joint having their capacities was required for transmitting loads at angles from a drive shaft. Some of plaintiff's standard universal joints were manufactured with a design and type of extremity according to information furnished by some automobile manufacturer purchasing them but such joints were sold under exemption certificates and no taxes were paid thereon.

Plaintiff sold its universal joints in large commercial quantities. While the majority of the universal joints was sold for automobile and truck use, yet many of them were sold in commercial quantities to manufacturers, jobbers, dealers, and distributors to be used on a variety of machinery such as tractors, trailers, hoists, locomotives, lawn mowers, loading machinery, concrete mixers, stump pulling equipment, street cars, winches, refrigerators, power take-offs, boats, and various testing machines.

The universal joints and universal joint parts upon the sales of which the taxes were sought to be recovered were standardized universal joints and parts designed and manufactured to be used as a coupling between two shafts operating at varying angles from one another wherever such a coupling was required. They were commonly and ordinarily sold for purposes not connected with an automobile, and were as well adapted for those purposes as for automobile purposes.

8. A gear transmission is a set of gears operating between a driving shaft and a driven shaft either for increasing or decreasing speeds or for reversing the rotary movement. Prior to the appearance of the automobile, transmissions were used in machine tools. However, a pulley transmis-

sion is used for a machine tool, while a gear shift transmission is used for an automobile.

The "Jumbo" transmission was composed of a transmission case, or housing, and eight gears, four of them being mounted integral. The drive gear, two sliding gears, and the idler gear were directly above the integral gears. There was an opening in the side of the transmission case through which power could be taken by meshing with the idler gear a gear of the correct pitch, mounted on a shaft. This opening was called the "power take-off" opening, and made it possible to divert power from the Ford Model T internal combustion engine through universal joints, chains or bolts to wherever the power was required. By meshing proper-sized gears with the idler gear in the transmission, any amount of torque required could be delivered out of the power take-off openings.

The "Jumbo" transmission was designed as and was an auxiliary transmission to be attached to the planetary transmission of the Model T Ford motor, for the various uses to which the Ford engine was being put, and to supply the demand for a sturdy, flexible unit that would increase the number of uses and adaptability of the Model T Ford engine, especially as a stationery power plant. The "Jumbo" transmission could not be used as a transmission by itself alone, nor to replace the planetary transmission in a Ford automobile or truck, but when installed in a Ford Model T automobile it became one of the operating units of the car.

9. Plaintiff made the "Jumbo" transmission for the Price-Hollister Company, which bought the entire output and was the exclusive owner and user of the trade-mark "Jumbo", under which mark the transmission was sold. The transmissions were designed and manufactured at the suggestion of the Price-Hollister Company, which company advertised the "Jumbo" transmission in its "Parts Price List" of models 600–333. The transmission was sold as a unit and specially designed attachments for mounting on the Model T Ford automobile or truck chassis could be ordered and purchased. The transmissions might be used

on other equipment when there was a special adaptation of the transmission to such equipment or special design of such equipment to incorporate the "Jumbo" transmission.

10. The transmissions were sold not only to automobile manufacturers but to jobbers who in turn sold them to retail merchants, garages, and machine shops in commercial quantities for use on a variety of machinery, such as automobiles, trucks, tractors, air-brakes, air compressors, clam shovels, concrete mixers, corn huskers, donkey engines, elevators, farm machinery, firefighting apparatus, hand cars, hydraulic hoists, lawn mowers, coal mine hoists, logging outfits, merry-go-rounds, machine shop machinery, pumps, snow plows, road machines, and winches.

The "Jumbo" transmission and a Model T Ford engine could be mounted on a platform, framework, or any plane surface and connected with a non-automobile machinery assembly by any repair man or individual user without alteration of the engine, transmission, or machinery assembly. No adapting parts were required. To install the transmission in an automobile or truck chassis, however, special attachments had to be used, numerous changes had to be made in the automobile chassis and eighteen precision operations, accurate to 4/1000 or 5/1000 of an inch, had to be performed for which special skill was required. An ordinary repair man, unless he had had sufficient schooling, could not make the installation.

The transmission was sold with or without attachments, but unless otherwise indicated by the purchaser the whole unit including the specially designed attachments was shipped on every order. When a transmission was completely installed in a Ford passenger car or truck, the car could be used both for automobile purposes and as a portable power plant.

The "Jumbo" transmission, with attachments, complete, upon the sales of which the taxes herein sought to be recovered were paid, was primarily designed and adapted for use in connection with the Ford Model T engine, but not primarily designed or adapted for installation in a car for automotive purposes.

11. Plaintiff is a citizen of the United States, and as administratrix of the Estate of Eric S. Ekstrom, Trustee for the stockholders of Mechanics Machine Company, is the owner of the claims sued on, no part of which has been sold or assigned, except by Mechanics Machine Company to Eric S. Ekstrom, as set forth in Finding 1, *supra.*

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action to recover with interest the sum of $54,451.90 paid by the Mechanics Machine Company as manufacturers' excise taxes under section 900 of the revenue act of 1921 and section 600 of the revenue act of 1924. The Mechanics Machine Company from January 1921, until its dissolution, was an Illinois Corporation engaged in the manufacture and sale of transmissions and parts therefor, also universal joints and parts therefor. On June 30, 1928, the directors and stockholders of the Mechanics Machine Company voted to dissolve the corporation. At the same time they turned over all of the corporate assets, including the claims herein involved, to Eric S. Ekstrom, who was then president of the company, in order that he might dispose of the assets, pay the corporate debts, and distribute the balance to the company's stockholders. After that date the company did no business and its charter was forfeited on September 24, 1930, by the State of Illinois. Ekstrom remained liquidating trustee until his death on January 12, 1936. Prior to that time he had paid all the corporate debts and completed all of his assignment except that which pertained to the collection and distribution of the claims involved in this suit. His widow and administratrix, Grace M. Ekstrom, was substituted as party plaintiff herein by order of this court dated August 17, 1936.

Refund claims covering payments made for taxes on sales during the years 1921 to 1926, inclusive, were duly filed. All of the claims were rejected except the claim filed on April 4, 1925, for a refund of $4,933.60. This claim was allowed in the sum of $4,876.03 with interest.

Within two years after the rejection of the other refund claims, the original petition was filed on January 23, 1928.

It appears that the Machine Company made and sold universal joints and a mechanism called the "Jumbo" transmission together with attachments for connecting these several mechanisms with other machinery and paid taxes on the sales thereof as shown in the findings. One issue in the case is as to whether these sales were properly taxable. The defendant also alleges that the party now prosecuting the action is not entitled to maintain it and that the plaintiff has been guilty of laches.

A universal joint is a flexible coupling permitting motion at varying angles while transmitting power from a driving member to a driven member. It is a matter of common knowledge that all automobiles make use of universal joints in transmitting the power from the engine to the wheels—usually the rear wheels—the line of the engine shaft being at an angle with the shaft connecting with the differential which operates in giving motion to the wheels. The principle employed in the universal joints is very old and known since the tenth century. For many years prior to the advent of the automobile they had been used in numerous mechanisms and at the time the taxes involved were levied were made and sold by the Machine Company and other manufacturers in commercial quantities to be used on a great variety of machines, a number of which are listed in Finding 7. The joints here involved are the seven standard sizes of universal joints made by the Mechanics Machine Company. These standard joints differed from each other only in weight and capacity, were all of the same design, and all designed to be used as a coupling between two shafts operating at different angles from one another in any kind of machinery requiring such a transmisison of power. They were not specially designed for use in automobile mechanisms as it required no special design for such use and they were equally adapted for use in other mechanisms as well as for use in automobiles. The extremities of universal joints necessarily were made to fit the extremities of the machinery with which they were to be connected but the same type of fittings employed by automobiles was also

used for connections with other machinery. In this connection it should be noted that joints specially made for automobile manufacturers and sold to them are not involved herein. No taxes were paid on these joints. They were sold under tax exemption certificates, the tax being paid by the automobile manufacturer when they became part of the car. No changes in the universal joints on which the plaintiff paid the tax were required to make them operate satisfactorily in mechanisms not used for automobile purposes and they could be used interchangeably without alteration in assembling machinery in either case. Under familiar rules the sales of universal joints were not taxable.

The other matter in controversy relates to taxes levied upon sales of what are called "Jumbo" transmissions.

These transmissions were made by the Machine Company for the Price-Hollister Company, a sales company which bought the entire output of the Machine Company.

The term "transmission," as used in this case, means a set of gears operating between a driving shaft and a driven shaft either for the purpose of increasing or decreasing the speed of the revolutions of a shaft or reversing the rotary movement thereof. At the time the Jumbo transmission was designed the Ford Model T power plant was being extensively used as a stationary engine furnishing power for a number of purposes not connected with an automobile. The Price-Hollister Company concluded that there would be an active demand for a transmission to be attached to the planetary transmission of the Model T motor in such form as to supply the demand for a sturdy flexible unit that would increase the number of uses of the Model T Ford engine especially as a stationary power plant. At that time there were thousands of Ford Model T engines which were lying unutilized in storage in various parts of the country. The design of the Jumbo transmission facilitated the use of these unused Ford engines as stationary engines and also increased the use of any Ford truck or automobile into which the transmission was built, by converting it into a power unit which could readily be moved from one stand to another.

The Jumbo transmission was composed of a transmission case, or housing, and eight gears, four of them being mounted integral. The drive gear, two sliding gears, and the idler gear were directly above the integral gears. There was an opening in the side of the transmission case through which power could be taken by meshing with the idler gear a gear of the correct pitch, mounted on a shaft. This opening was called the "power take-off" opening, and made it possible by methods known to any ordinary mechanic to divert power from the Ford Model T internal combustion engine to wherever it was required. By meshing proper-sized gears with the idler gear in the transmission, any amount of torque required could be delivered out of the power take-off openings.

This transmission was sold by the Price-Hollister Company not only to car dealers and machine shops but also to retail merchants, garages, and makers of machines not used for automobile purposes for use on a great variety of machines listed in Finding 10.

The statute makes sales of "parts" or "accessories" of automobiles taxable but does not define these terms. For an explanation of their meaning we must look to the regulations.

The Supreme Court has given a definition of what constitutes a part or accessory to an automobile in *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583, wherein it is said:

> The administrative regulations issued under § 900 uniformly have construed the term "part" in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term "accessory" as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.

These regulations were approved.

It seems to have been considered by the Commissioner of Internal Revenue and argued on behalf of defendant that because the Jumbo transmisison was primarily designed and adapted for use in connection with the Ford Model T engine and was in fact used in some instances as a part of a car or truck, it follows that the transmission was an automobile part and taxable as such. That this is not enough is apparent on reading the regulation; see also *Milwaukee Motor Products, Inc.* v. *United States*, 66 C. Cls. 295, 302. In order to make the part taxable it must, under the regulations, be designed for the *special purpose* of being used as, or to replace, a component part of a self-moving vehicle and be such an article as would not ordinarily be sold for general use, but be *primarily adapted* for use as a component part of such vehicle. This description can not be applied to the Jumbo transmission as will be seen when we consider later its construction, adaptation, and use.

The regulations further provide [Regulations 47 (Revised), Article 14] that—

> Any article which has reached a state of manufacture wherein it is in itself a component part or accessory and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer is subject to tax as a "part or accessory".

Here again we shall find on examination that this regulation excludes the Jumbo transmission.

The findings show that the Jumbo transmission could not be installed in an automobile or truck by an ordinary repair man or individual user but on the contrary required a highly skilled mechanic to make a number of precision operations, fittings, alterations, and changes in the chassis of the car, all of which necessarily would require considerable expense. In fact it could not be used in an automobile as originally constructed. Under the regulations the transmission under consideration would not be taxable because it could not be fitted into an automobile by an ordinary repair man. This same fact, we think, shows that it could not have been designed for the "special purpose" of being used as a component part of an automobile and

(in connection with the other facts) also shows that this transmission was not primarily adapted for use as a component part of an automobile.

When the transmission was installed in a car, the purchaser acquired a new transmission in addition to the one already therein. Whether the result was an improvement in operating the car is not disclosed, but considering the total expense in the cost of the transmission with installation and the fact that there was already a transmission in the car which was workable and practical, it would seem that there would be little demand for the Jumbo transmission merely to have a different kind with which to operate the car, that when so used it was more for the purpose of obtaining a portable power plant than for any added convenience in operating the automobile, and that it was so designed. Be this as it may, when there were thousands of Model T Ford engines lying detached in all parts of the country, it is quite plain that the principal demand for the transmission would be for use in connection with these detached engines as a stationary power plant. For this purpose they were not merely equally adapted, but far better adapted than for use as a part of the car for automotive purposes. In this connection it will be noted that it required only slight mechanical skill to connect the transmission with an engine separate from the car in such a manner that it could be used as a power plant. Most farmers who have the skill needed for making the necessary adjustments in farm machinery would be able to make the attachment.

The evidence shows that the Jumbo transmissions were sold with certain attachments when they were ordered or the manufacturer had reason to believe they were to be used for a particular purpose. There were three kinds of these attachments, one kind apparently being used when the transmission was to be made a part of the car. The defendant contends that when so sold, the transmission with attachments being intended for use in an automobile, it became a taxable accessory or part and that as there is nothing to show how many were so sold there can be no

recovery in the case. We do not think this follows. The evidence does not show just what these attachments were, but whatever they were they did not do away with the necessity for the precision operations that we have described above or the alterations and changes necessary to be made in the chassis of the car. The evidence shows that the transmission itself was a unit, was equally adaptable for many other purposes, and was so used. If the purchaser chose to add some other attachments, we do not think it alters the situation so far as the taxability is concerned. Moreover, the evidence does not show what these attachments were or the particular purpose which they served, but it does appear that even when they were furnished the precision operations and alterations and changes in the chassis, to which we have before referred, had to be made by a skilled mechanic and could not be accomplished by an ordinary repair man. In other words, the purchaser had to adapt the car to the transmission before it could be used and even when it was installed it seems probable that his primary purpose in so doing was rather to obtain a portable power plant than to improve the operation of the automobile.

We think that when the regulations are applied to the facts in the case it clearly appears that the sales of the Jumbo transmissions were not taxable.

As a special defense in the case it is contended on behalf of the defendant that no right of action existed on behalf of Eric S. Ekstrom as trustee for the stockholders of the Mechanics Machine Company and that even if such right did exist the present plaintiff was improperly substituted by this court and the petition should be dismissed.

The theory advanced by defendant is that after the dissolution of the corporation all pending litigation was abated. This is contrary to our decision in the case of *Oberndorfer* v. *United States*, 65 C. Cls. 376, and also contrary to a number of Illinois decisions holding that where a corporation has brought suit within the two-year period prescribed by the statute for winding up its business it may be prosecuted to judgment after the expiration thereof.

In support of the argument of defendant, the case of *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257, is cited, but we do not think it is applicable. It is said in the opinion with reference to statutory authority for the prolongation of the period—

> The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.

The defendant, however, concedes that the Illinois law is as above stated. R. S. 955 (28 U. S. C. A. 778) provides that when a party to any suit dies pending final judgment and the cause of action survives at law the executor or administrator may prosecuté the suit to final judgment, and the Supreme Court said in *Baltimore & Ohio RR. Co.* v. *Joy, Admr.*, 173 U. S. 226, 229:

> Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. If an action be brought in a Federal court, and is based upon some Act of Congress, or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statutes of the United States relating to that subject.

Under the rule laid down above it is clear that Mrs. Ekstrom is the party to continue the present action.

We also think that the court acted in pursuance of the general rule that a court of equity will not permit a trust to fail for want of a trustee, and by permitting the wife to continue the suit in effect treated her as a successor to her husband in the trusteeship. It may be conceded that under the common law and the Illinois law a trustee successor to Mr. Ekstrom could have otherwise been appointed to maintain this action. But no successor was appointed. If Mrs. Ekstrom be not allowed to continue this action and it is dismissed the trust will fail, although it is conceded that Mrs. Ekstrom now has title to the trust property. It is true that the successor in title to trust property may not be

Opinion of the Court

qualified or be a proper party to administer the trust, and in such cases a court of equity will displace such a trustee with one selected by the court; but it is also the rule that the court may in some circumstances refuse to appoint a substitute and in Bogert on Trusts (1935 Edition) Sec. 529, p. 1679, we find the following:

> Where, for instance, the only remaining duty is to distribute the trust property among the beneficiaries according to a prescribed schedule, no special qualifications are required for the task, and hence no appointment [of a new trustee] will be made.

Perry on Trusts (Seventh Edition) Sec. 344, p. 586, goes farther and shows that the executors will take the trust property and while they are not obliged to execute the trust they may do so. The same work is authority for the rule that the executor or administrator of a trustee may continue an action, which is supported by numerous authorities. When this court recognized the right of the administratrix of the trustee to continue the suit, it merely carried out the principles of equity and justice following its former decision.

Laches in the application for the substitution of the present plaintiff in the place of the original trustee is also set up as a defense. We think it is a sufficient answer to say that the defendant has in no way been prejudiced thereby and that by proper action on its own part the proceedings could have been hastened.

Our conclusion is that the plaintiff is entitled to maintain the action and to recover with interest the amount of taxes in controversy erroneously collected in accordance with this opinion and the findings of fact. Judgment will be suspended awaiting a stipulation of the parties as to the amount due in accordance with the opinion of the court, or if the parties cannot agree they may file their respective computations and the court will determine the amount. An equated date may be used as the date from which interest will run if the parties so agree.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

ALLEN POPE v. THE UNITED STATES

[No. K-366. Decided December 6, 1937. Certiorari denied by the Supreme Court, March 28, 1938]

On Fourth Motion for New Trial

Jurisdiction.—Where fourth motion for a new trial is based on allegations of fraud, and the record relied on to establish the allegations is in most respect the record before the court in previous hearing, the court is without jurisdiction to grant a new trial. *See Allen Pope* v. *U. S.*, 81 C. Cls., 658. *U. S.* v. *Throckmorton*, 98 U. S. 61, differentiated.

The Reporter's statement of the case:

Mr. Allen Pope, pro se.

The motion for a new trial was overruled in the following per curiam opinion:

Allen Pope, the plaintiff in the case of *Pope* v. *United States*, 76 C. Cls. 64, files a fourth motion for a new trial. The court in 81 C. Cls. 658 discussed *in extenso* the grounds for overruling a third motion containing substantially the same allegations of fact as appear in the present motion.

The allegations of the present motion, i. e., fraud, perjury, and deliberate suppression and perversion of facts, as well as deletion of the printed record, constitute most serious accusations against government officials, and we are not to assume that they have been made without due and careful consideration.

In the trial of the case the record disclosed constant and vigorous disputation between the plaintiff and government officials during the progress of the contract work. The court did not discover the presence of fraud, perjury, etc., now insisted upon, notwithstanding the apparent hostile attitude of the parties toward each other and the existence of the charges at the time of trial.

The plaintiff has contended all along since the decision in his case for an opportunity to prove the serious charges he makes, aside from the contentions to this effect originally

made. We discussed in 81 C. Cls. 658 our inability to grant the new trial asked for, and we are convinced now, as we were then, that the court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court.

The case of *United States* v. *Throckmorton*, 98 U. S. 61, is cited as sustaining plaintiff's contention that even on this late date the court has jurisdiction to grant a new trial and readjudicate his case. The difficulty of applying the principles of the cited case to this motion lies in the fact that the record to establish the so-called extrinsic fraud, etc., in most respects is the precise record the court had before it originally.

In the *Throckmorton case*, quoting from the syllabus, the court held:

> The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit.
>
> The cases where such relief has been granted are those in which, by fraud or deception practised on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

The remedy available to plaintiff, in our view of the present status of the record, resides exclusively in Congress, and in Congress alone. The court is without jurisdiction to grant plaintiff's motion and it is overruled. It is so ordered.

JOHN SHERMAN HOYT, EXECUTOR, ESTATE OF HENRY R. HOYT v. THE UNITED STATES

[No. 42129. Decided December 6, 1937]

On the Proofs

Estate tax; claims for refunds.—Where written statements concerning items of claims against an estate and concerning expenses of administration have been filed within the required four-year

period after payment of tax, there was no fatal departure from requirement of the statute relating to claims for refund and no material departure from requirements and procedure of the Bureau's rules and regulations, although such claims were not filed upon printed Treasury Form 843.

Same. Payment of note and receipt of stock pledged as collateral.— Where decedent's estate in 1921 paid note at bank, on which decedent was accommodation endorser, and estate received stock certificates which had been pledged as collateral by maker of note, it was properly construed by Commissioner of Internal Revenue that the stock so received by the estate repaid the estate for the amount paid out, and is not to be allowed as a deduction in the determination of the estate tax; but the loss, if any, sustained by the estate on the stock so acquired, is a deduction properly to be allowed from income in the year in which the loss is sustained.

The Reporter's statement of the case:

Mr. Edward F. Colladay and *Mr. Wm. D. Gaillard* for the plaintiff. *Colladay, McGarraghy, Colladay & Wallace,* and *Gaillard, Fisher, Allen & Bateson* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris,* and *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar,* for the defendant.

Plaintiff seeks to recover $112,175.01, alleged overpayment of estate tax, with interest from the date of payment, January 4, 1922. This claimed overpayment results from the failure of the Commissioner of Internal Revenue to give the estate the benefit of two deductions as claims against the estate in the amounts of $582,681.48 and $113,440.68, and for executors' fees and commissions in the amount of $123,-640.70. The reason for the disallowance of these deductions when final action was taken with respect thereto, December 29, 1930, was that the estate had not made a timely claim for refund on account thereof.

In this proceeding the defendant does not question the legality of the first and third items mentioned above but opposes recovery of any amount on the ground that no claim for refund was made by the estate with reference to any of the items sued upon within the time required by law. The alleged deduction of $113,440.68 is opposed on the merits.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Henry R. Hoyt died testate January 4, 1921. John Sherman Hoyt and Alfred O. Hoyt were named as executors of the estate and were duly appointed and qualified. Alfred O. Hoyt resigned as executor December 9, 1926, and John Sherman Hoyt served until his final accounting was accepted by the Surrogate's Court November 15, 1929. The decree of the court directed that he turn over to himself, as trustee, all the assets of the estate then remaining in his hands as such executor. The executors duly filed a federal estate tax return for the estate of Henry R. Hoyt reporting a net estate of $2,889,489.75 and a tax liability of $300,028.57 which was paid January 4, 1922. An additional tax of $161,000 was paid February 22, 1922.

2. At the time this return was prepared and at the time it was filed, the executors had before them the matter of deductions for (1) executors' fees and commissions, (2) contingent liability on a promissory note of T. H. Frothingham for $112,500 with interest which the decedent had endorsed (an involuntary petition in bankruptcy had been filed against Frothingham), and (3) claims of P. A. Rockefeller and others against the estate in a suit that had already been instituted and claims in respect of which a suit was thereafter instituted. These unascertained claims were estimated in the amount of $850,000. The estate was large and there were many items of property and many claims, other than those above mentioned, to be dealt with, accounted for, and settled. The executors had no way of accurately estimating what the executors' fees and commissions would ultimately amount to or of determining with any degree of accuracy the amounts which the estate would finally be called upon to pay on account of the asserted liability in respect of the items of $112,500 and $850,000 above mentioned. The best the executors could do with reference to the deduction for executors' commissions was to take a deduction for the amount of $78,443.40 which had been submitted to the Surrogate's Court, and was to be allowed by the court. Accordingly this amount was deducted under

Schedule H of the return. And with reference to the other two items of claims against the estate as above mentioned, which at that time were indeterminate in amount, the executors took no deductions on account thereof, but in the return, Schedule I (Debts of Decedent), there was included the following:

CONTINGENT LIABILITIES

B. Contingent liability of decedent for payment of demand promissory note dated August 30, 1920, made by *Thomas H. Frothingham* of Far Hills, New Jersey, to the Chatham and Phenix National Bank for $112,500 with interest, and secured by 1,820 shares of preferred stock of Old Reliable Motor Truck Corporation (organized in Illinois), said note having been duly endorsed by decedent for the maker's accommodation. An involuntary petition in bankruptcy was filed against said Frothingham on December 12, 1921, in the United States District Court for the Southern District of New York. Decedent's estate is liable for the payment of the face value of the note amounting to ______________ $112,500

And interest, less proceeds of sale of securities held as collateral therefor.

N. B.—It is submitted that the deduction if any to be allowed with respect to the foregoing item in fixing the taxable value of decedent's estate be suspended, pending the determination of the amount of the estate's liability in the premises.

C. *Claims of P. A. Rockefeller and others:*

The executors have been notified by attorneys for the claimants that actions are about to be commenced against the decedent's estate on claims for damages alleged to have been sustained in certain stock transactions. The claims above referred to which will be disputed by the executors are represented as amounting in the aggregate to the sum of about ______________ 850,000

The claimants have hitherto refrained from presenting to the executors their formal claims against the estate of decedent.

N. B.—It is submitted that the determination of any deduction to be allowed with respect to the claims above referred to in fixing the taxable value of decedent's estate be suspended pending the result of any litigation to be instituted for the purpose of enforcing the collection of said claims.

In computing the net estate no portion of the above-mentioned items of $112,500 and $850,000 was taken as deductions on the return.

3. August 30, 1920, Thomas H. Frothingham, a son-in-law of the decedent, borrowed $112,500 from The Chatham and Phenix National Bank of New York City on a demand collateral note which was endorsed by the decedent. Payment of the note was secured by the hypothecation by the maker of certificates representing 2,362 shares of stock of the Old Reliable Motor Truck Corporation. Frothingham, in this note, represented that the stock had a total value on the date pledged of $118,000.

The note, by its terms, empowered the holder thereof to sell the collateral security in event of nonpayment of the note, and contained the following further provisions:

"If the collaterals held by the owner of this note shall at any time decline to within ten percent in excess of the amount then remaining unpaid thereon, this note shall, at the option of the holder at any time thereafter, be deemed due and payable forthwith without demand or notice, and the holder shall thereupon have all the power above given as to sale of securities and application of the proceeds in case of non-payment at maturity."

4. The bank made demand on the maker for the payment of this note. On October 13, 1921, plaintiff, as executor of the decedent's estate, upon demand paid the bank the amount borrowed, $112,500, together with accrued interest in amount of $940.68, whereupon the bank surrendered the note to plaintiff, together with the collateral attached thereto. Upon receipt of these stock certificates the executor surrendered them to the company and received therefor 1,820 certificates. The stock had a book value at the date of the decedent's death and at the time it was surrendered to the executor of at least the face of the note, plus accrued interest, or a total of $113,440.68. The estate took it up on its books at that value. The Old Reliable Motor Truck Company was discharged in bankruptcy July 10, 1927. Plaintiff has never received anything for said stock so held by him.

In October 1921 Thomas H. Frothingham was a member of the brokerage firm of Potter and Company, to which he was indebted in sums aggregating more than $2,000,000. That firm held collateral security for the indebtedness, some of which was readily salable and some not. In order to prevent the sacrifice of the securities which did not have a ready market, he borrowed $481,945.38 from A. M. Hoyt and Company, composed of the decedent and his two brothers, liquidated his indebtedness to Potter and Company, and received back his collateral.

On September 26, and October 1, 1921, Frothingham and his wife executed deeds of trust appointing William R. Perkins and Charles Caldwell trustees, to whom he turned over all his assets for the benefit of his creditors. The assets received by the trustees were sold by them, for which the sum of approximately $465,000 was realized. On December 3, 1926, the trustees submitted their report setting forth the income and disbursements of their trust, and they were thereupon duly released as such trustees.

A fund was subscribed by members of Frothingham's family and others, the proceeds of which were used in effecting a compromise with a creditor who had on December 12, 1921, filed an action in bankruptcy against him. As a result of these contributions, the action in bankruptcy was discontinued by the petitioning creditor and, therefore, no occasion arose to compel the executors to surrender the stock of the Old Reliable Motor Truck Company to the trustees appointed by Frothingham.

5. In December 1921 suit was instituted in the Supreme Court, New York, by one Percy A. Rockefeller against Alfred O. Hoyt and John S. Hoyt as executors of the estate of Henry R. Hoyt, deceased, and Thomas H. Frothingham, seeking recovery of $278,750 as damages alleged to have been sustained by said Rockefeller in the purchase of certain stock, as to which Rockefeller claimed the decedent and his son-in-law Frothingham had made false and fraudulent representations upon which Rockefeller relied in purchasing the stock.

In June 1926 a similar suit was instituted against the aforesaid executors by Thomas A. Howell and others alleg-

ing a similar cause of complaint and claiming damages in an aggregate amount of $464,001.

The suits were settled by the parties thereto late in 1929 for the sums of $271,250 and $278,750, and releases were given by the plaintiffs in such suits to the defendants therein. During the pendency and in the settlement of the suits, the estate incurred and paid attorney's fees in the amount of $32,681.48.

6. On October 17, 1929, the executor rendered his final account to the Surrogate, wherein he claimed, as deductions from the estate, the aforesaid attorney's fees of $32,681.48, the amount of $550,000 paid in settlement of the Rockefeller and Howell suits, and $123,640.70 as executors' fees and commissions paid to the plaintiff and his former co-executor, Alfred O. Hoyt.

On November 15, 1929, the Surrogate entered a decree on accounting in the decedent's estate allowing and approving, among others, the above expenditures by the executors and the settlement of his account as such executor. In the decree the Surrogate also allowed executors' fees and commissions as follows:

John S. Hoyt	$58, 190. 67 10, 450. 03
Alfred O. Hoyt	55, 000. 00
	123, 640. 70

7. For a period of more than four years after the estate tax return was filed, the same was under consideration and audit in the Commissioner's office; various items and matters in connection with the estate and with reference to the estate tax liability were considered and discussed, and a number of conferences were held between the Commissioner through his authorized representatives and the estate. Many affidavits, briefs, and statements of evidence on behalf of the estate in connection with the various matters discussed, considered, or decided by the Commissioner were filed by the estate during the period from early in 1922 to about October 1925. In a number of these conferences in 1924 and 1925 during consideration and audit of the estate tax return, the matters of the proper amounts to be deducted on

account of the claims of Rockefeller, Howell, and others, estimated in Schedule I of the return at $850,000, deductions on account of executors' fees and commissions to be allowed on the final accounting in the Surrogate's court, and the proper refund, if any, to be allowed to the estate on account thereof were suspended and held in abeyance and were not taken up and considered or decided in connection with various other items relating to the value of the estate and to the tax liability or in connection with certain refunds allowed by the Commissioner in 1924 and 1925.

On November 10, 1923, the executors in an affidavit filed with the Commissioner with reference to matters then under consideration, other than the items involved in this suit, set forth, among other things, the following: "And deponent further shows that no deduction has yet been attempted to be made to cover the amount of the executors' commissions which have not been determined and cannot be awarded until such time as the executors are enabled to commence their proceedings for a final accounting; nor for any additional expenses or attorneys' fees and for disbursements which will undoubtedly accrue in the future in the various proceedings which are still pending in the court of the administration of the decedent's estate. And deponent respectfully submits that by appropriate notation any rights accruing to the estate with reference to a proper refund to cover commissions and supplementary expenses of administration should be protected in the usual manner."

June 25, 1924, the executor of the estate in an affidavit filed with the Commissioner in connection with another item then under consideration set forth the following: "In this connection we again beg to call the Department's attention to the other contingent liability items, decision as to which must necessarily be suspended, which are enumerated under the head of contingent liabilities listed in Schedule I of the executors' return." In a letter to the executors of September 17, 1924, the Commissioner in allowing an overpayment of $27,365.71 in respect of certain items in connection with the return, other than those involved in this suit, stated to the executors that no deduction was being made in connection with that refund for executors' commissions for the

reason that such commissions had not been paid. October 31, 1924, the executors in filing a claim for refund on items not involved in this suit attached thereto an affidavit stating that "Deponent further says that the claims of P. A. Rockefeller and others referred to Schedule I, Contingent Liabilities, Item C, still remain pending and undetermined; that no proceedings for a judicial settlement of the executors have been begun; and that no award of executors' commissions has yet been made." This refund claim was allowed, but no decision was made or action taken by the Commissioner on the other items mentioned above.

In addition to the partial refund of $27,365.71 allowed and made as above mentioned, the Commissioner on September 25, 1925, in connection with another refund claim made by plaintiff October 31, 1924, in connection with items other than those involved in this suit, allowed and paid a further refund of $18,024.63. In none of his decisions on the refunds allowed on other items which arose and were considered and decided during the audit of the return did the Commissioner consider or deny the claim of the estate that it was entitled to deductions on account of the claims made against the estate by Rockefeller and others and for executors' commissions; but, as hereinbefore stated, these matters and the facts with reference thereto were brought to the attention of the Commissioner and, in conferences held, it was agreed that the proper amount to be deducted and the refund, if any, accruing to the estate on account thereof would be held in abeyance.

8. With reference to the item of $112,500 which was one of the contingent liability items on account of the Frothingham note mentioned in Schedule I of the return, and in connection with which no deduction was taken in the return, it appears that prior to June 25, 1924 (the note having been paid by the estate and the collateral attached thereto having been received by the estate), the Commissioner valued such collateral, consisting of 1,820 shares of stock of the Old Reliable Motor Truck Corporation, at $182,000 and proposed in a letter to the estate to increase the gross estate in the amount of $69,500 on account thereof. In an affidavit of June 25, 1924, filed by the executors with the Commissioner

in connection with this proposed action with reference to the Frothingham note matter, the executor stated:

> It has already been made clear to the Department through the affidavit of John Sherman Hoyt verified December 17, 1923 (fol. 5 seq.), that the note in question secured by 1,820 shares (par value $100) of the stock of the Old Reliable Motor Truck Corporation as collateral had been discounted by the Chatham & Phenix Bank. The bank's loan had been made in favor of Thomas S. Frothingham, the maker of the note. The collateral was the sole property of the maker to which neither our testator nor the executors under his will ever had or claimed a scintilla of title. Our decedent was merely an accommodation endorser. Some time after the decedent's death the maker defaulted. Decedent's executors were compelled to pay the amount due by Frothingham under the endorsed note and thereupon the payee turned over to the executors both the original note and the stock held as collateral for its payment. Both note and collateral still remained in the executors' hands, the note unpaid and the collateral unsold. For the information of the Department, it is proper to state that the involuntary proceedings in bankruptcy against Frothingham, the maker of the note, which were reported in the estate's return as having been filed on December 12, 1921, have been discontinued. A fund was subscribed by members of the debtor's family and others, the proceeds of which were used in effecting a compromise with the petitioning creditor in bankruptcy, to which the decedent's estate was not a contributor. No occasion, therefore, ever arose to surrender the collateral to any trustee in bankruptcy.
>
> There can exist no possibility of a doubt that the Chatham & Phenix Bank had a valid claim against the maker of the note to the extent of $112,500. The bank had an equally valid claim against the decedent and the executors of his estate. The maker was insolvent; so that upon payment of the note by the executors upon the maker's default they would be entitled to deduct the amount paid as a proper allowance in determining the taxable corpus. This deduction would become subject to revision only by an amount representing not the intrinsic value of the collateral but the actual proceeds of its sale. If the sale should realize, say, $50,000, the estate would be entitled, in fixing the estate tax to a deduction not hitherto claimed, of $62,500, the difference between $112,500 and the proceeds of the collateral. If

it should realize, say, $150,000, the debt would be liquidated; and the surplus proceeds of, say, $37,500 would become distributable pro rata among the creditors of Frothingham; and the estate would be entitled to its pro rata share for application on the amount of Frothingham's general indebtedness.

Now it may be stated that the executors have continued to remain the involuntary custodians of this collateral since they were compelled to intervene. It represents the stock of a private manufacturing corporation. The book value of the security, whatever such value may be, seems quite irrelevant to the present inquiry. Whatever else may be said, the executors may certify to the Department that they have hitherto been quite unable to dispose of any of this stock; that there exists, so far as they have been able to discover, no demand for it; and that, as matters now stand, if offered in the open market, the stock would probably elicit but a nominal bid. We have no wish or desire to reflect upon the standing of the corporation; but the Government is entitled to be informed as to the facts in regard to the present possibility of marketing the stock to advantage. As a matter of fact under present conditions, there exists no such possibility, so that for the present at least and until conditions change, the executors will be obliged to retain it in their custody unsold; and it follows that the specific inquiries of the Department along the lines which you have indicated are not at present answerable. The entire situation, so far as ultimate adjustments are concerned, still remains and, for the present must continue to remain, a purely speculative proposition.

On the occasion of an early hearing in Washington we received the impression that under the circumstances the Government would be disposed to waive the question of the ultimate application of the collateral if the debt to the Chatham & Phenix Bank was not pressed as a deduction; or, in other words, that the estate be considered as having been repaid; and we had presumed that the item would be subject to disposition upon some such basis. We are still willing that the matter be disposed of in this way so as to reduce in so far as possible the element of contingency. If this is not to be done, however, but one alternative would seem to present itself; and that would be to provide that the deduction, if any, to be allowed with respect to the debt and the application of any possible equity in the collateral be suspended pending the actual determination of the amount of the

estate's liability. The Department may take notice that this disposition of the matter was suggested in the executors' return.

Thereafter, upon consideration of this item in connection with the audit of the return, the Commissioner on September 17, 1924, in making a partial refund of $27,365.71 as hereinbefore mentioned definitely decided the estate's claim with reference to a deduction on account of the Frothingham note which had been endorsed by the decedent and paid shortly thereafter by the estate, and advised the estate of his decision thereon in connection with the statements contained in the executors' affidavit of June 25, 1924, mentioned above, as follows:

	Returned	*Determined*
1,820 shares Old Reliable Motor Truck Corporation which is determined as having a value of $182,-000 at the date of the decedent's death. This, however, was held merely as collateral security and inasmuch as the bankruptcy proceedings have been vacated and this estate may at some later time participate with other creditors should a sale thereof prove to be in excess of the estate's equity of $112,500, no value is placed thereon at this time but a supplemental return should be filed and tax paid thereon at a future date if the estate realizes anything thereon, in excess of $125,000	00.00	00.00

9. On May 2, 1930, when the liability of the estate with reference to the claims against it by Rockefeller and others was settled and finally determined in the amount of $582,-681.48, and the executors' fees and commissions had been determined and allowed by the Surrogate's Court in the amount of $123,640.70, the estate filed with the Commissioner a formal claim on Treasury Form 843 for a refund based on the correct amount to be allowed as deductions on account of these items and, also, on account of the Frothingham note and accrued interest, totaling $113,440.68. The grounds set forth in this formal claim were as follows:

I. The contingent liability of decedent for payment of demand promissory note set forth in Schedule I, contingent liabilities, item B, in the Executor's main affidavit in the sum of $112,500 with interest has been determined on July 10, 1927, as an actual liability for

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$113,440.68. (Reference is made to affidavit of John Sherman Hoyt verified April 8th, 1930, hereto annexed and made part hereof.)

II. The claims of P. A. Rockefeller and others set forth in Schedule I, contingent liabilities, item C, in the Executor's main affidavit in the sum of $850,000 have been determined on May 23, 1929, as an actual liability for $582,681.48. (Reference is made to affidavit of John Sherman Hoyt verified April 8th, 1930, hereto annexed and made part hereof.)

III. Proceedings for a judicial settlement of the accounts of the Executors have been had, and on November 15, 1929, Executors' fees in the amount of $123,640.70 were allowed by the Surrogate on said account. (Reference is made to affidavit of John Sherman Hoyt verified April 8th, 1930, hereto annexed and made part hereof.)

The determination of the deduction to be allowed with respect to said items having been suspended pending the determination of the amount of those items, request is now made for refund of tax as follows:

Net estate (Department's letter Sept. 25, 1925)		$2, 690, 172. 69
Deduction as finally ascertained, Schedule I, Item B	$113, 440. 68	
Deduction as finally ascertained, Schedule I, Item C	582, 681. 48	
Schedule H, Executors' fees as finally ascertained	123, 640. 70	
		819, 762. 86
Corrected net estate		1, 870, 409. 83

The estate has made an excess payment computed as follows:

Paid January 4, 1922		$300, 028. 57
Paid February 22, 1922		161. 00
Total amount paid		300, 189. 57
Refund September 17, 1924	$27, 365. 71	
Refund September 25, 1925	14, 699. 68	
		42, 965. 39
		258, 124. 18
Tax upon the transfer of $1,870,409.83		145, 949. 17
Amount to be refunded as per foregoing finally ascertained claims		112, 175. 01

To this claim for refund was attached a lengthy affidavit by the executor calling attention to the claims made in Schedules H and I of the return with reference to these

items, to the correspondence which had passed between the estate and the Commissioner, to the various affidavits filed, and to the conferences held and the discussions and understandings had as to the refunds theretofore made by the Commissioner from time to time, all of which were, by reference, made a part of the formal claim, No. 843, of which such affidavit was a part. The facts with reference to the deductions made the basis of this formal claim for refund which had theretofore been brought to the attention of the Commissioner were again set forth in detail in such affidavit of the executors attached to the formal claim for refund.

The refund claim was rejected December 29, 1930, and the estate was advised as to the reasons for such rejection as follows:

> Your claim is based upon the contention that certain contingent liabilities of the decedent which were disallowed as deductions from the gross estate have since been paid, together with executors' commissions amounting to $123,640.70, making a total deduction of $819,762.86, thereby resulting in a refund as claimed by the estate of $112,175.01.
>
> The records of this Bureau show that the claim was filed on May 2, 1930, and that tax was paid in the amount of $300,028.57 on January 4, 1922, and $161.00 on February 28, 1922, which was more than four years prior to the date of the filing of your claim for refund. Under the provisions of Section 3228 of the Revised Statutes of the United States, as amended, the tax having been paid more than four years prior to the filing of the claim, no part of the tax paid is subject to refund.
>
> Therefore, in view of the foregoing provisions, your claim for refund is rejected in its entirety.

The statement in the above rejection letter, that the claim was based upon the contention that certain contingent liabilities of the decedent had been disallowed as deductions, was erroneous, except as to the Frothingham note item. The asserted deductions for claims against the estate by Rockefeller and others and for executors' fees and com-

missions had not been specifically disallowed by the Commissioner in any decision previously rendered.

The court decided that the plaintiff was entitled to recover with respect to the first and third items mentioned in the introductory statement and not entitled to recover with respect to the second [Frothingham note] item.

LITTLETON, *Judge*, delivered the opinion of the court:

In principle this case is like that of *Bourne* v. *United States*, 76 C. Cls. 680, 2 F. Supp. 228, and *Jones, et al.* v. *United States*, 78 C. Cls. 549, 5 F. Supp. 146. Compare *Night Hawk Leasing Co.* v. *United States*, 84 C. Cls. 596, 18 F. Supp. 938; *American Cyanamid Co.* v. *United States*, 78 C. Cls. 313, 4 F. Supp. 937. On the facts disclosed by the record when considered in the light and in the manner in which they were considered and treated by the taxpayer and the Bureau of Internal Revenue, there was no fatal departure from the requirements of the statutes relating to claims for refund, nor was there a material departure from the requirements and the procedure authorized by the rules and regulations of the Bureau of Internal Revenue with reference to bringing the matters in controversy to the attention of the Commissioner and to disclosing the grounds and the facts upon which the Commissioner might intelligently act in the premises. The only departure from the perfect procedure upon which counsel for defendant insists was merely a matter of form and not of substance. Had the estate typed upon a printed Treasury Form, 843, the written statements concerning the items of the claims against the estate and the administration expense involved in this suit or prepared on such a printed form the subsequent sworn statements concerning these items and the grounds and the facts disclosed in such sworn statements with reference to the propriety and legality of the claimed treatment of such items in the determination of the tax liability of the estate for any refund to which it might be entitled, a demand for refund within the meaning of the statutes and the regulations would not, in substance, have been more definitely as-

serted. Moreover, these matters and the facts relating thereto were brought to the attention of the authorized representatives of the Commissioner during consideration and audit of the returns and the consideration of all matters affecting the value of the estate and the resulting tax liability. At that time it was understood and agreed by the Commissioner's office that these matters, particularly with reference to the claims of Rockefeller and others and the executors' fees and commissions which were until November 1929 indefinite only as to amounts, should be suspended and held in abeyance pending ascertainment of the amounts which might be allowed as deductions in determining the correct tax liability of the estate. The Commissioner was not in any way misled. He had before him all the facts with reference to the items which the executors could furnish; the grounds on which the estate claimed that some allowance as deductions from the gross estate should be made on account thereof and he recognized that a proper refund resulting from the deductions, to which the estate claimed to be entitled, should be made. The Commissioner was in a position to act in the premises had he so desired. He did act and rendered a decision with reference to the Thomas H. Frothingham note item as we shall hereinafter show. However, with reference to the matter of the deductions to which the estate might be entitled on account of the claims of Rockefeller and others and the executors' fees and commissions, the Commissioner, as the facts disclose, agreed to wait until definite figures could be submitted on these items. He was clearly authorized to do this, thereby keeping the matter open. Such amounts were definitely determined in 1929, whereupon the estate submitted proof of the correct amounts to the Commissioner and requested the allowance as deductions and the refund of the resulting overpayment in accordance with its claims and the contentions previously and timely made. The deductions were refused and the claim for refund was denied on the ground that claim therefor had not been asserted within the time required by law. In this we think the Commissioner erred with respect to the claimed deductions of $582,681.48 paid to Rockefeller and

others in settlement of claims against the estate and of $123,-640.70, executors' fees and commissions allowed by the Surrogate Court. Plaintiff is therefore entitled to recover such overpayment as may result from the allowance of these items as deductions from the gross estate, together with interest as provided by law.

With reference to the item of $113,440.68, representing the principle and interest of a note of Thomas H. Frothingham which the estate paid upon default of the maker on demand of the Chatham and Phenix National Bank, it appears that the Commissioner in his allowance of a partial refund of $27,365.71 on September 17, 1924, definitely decided upon this item in accordance with the contention then made by the estate. Shortly prior to the date mentioned the Commissioner had taken this item up for consideration and proposed in connection with an audit and investigation of the estate to increase the gross estate by the amount of $69,-500 by reason of the fact, as found by him, that the stock of the Old Reliable Motor Truck Corporation, which was received by the estate when the Frothingham note was paid, had a value in excess of the principle and interest of the note. The estate requested that this not be done but that the stock be treated as taking the place of the amount paid on the Frothingham note for the reason that "On the occasion of an early hearing in Washington we received the impression that under the circumstances the Government would be disposed to waive the question of the ultimate application of the collateral if the debt to the Chatham & Phenix Bank was not pressed as a deduction; or, in other words, that the estate be considered as having been repaid; and we had presumed that the item would be subject to disposition upon some such basis. We are still willing that the matter be disposed of in this way so as to reduce in so far as possible the element of contingency." The Commissioner treated the matter of the Frothingham note and the Old Reliable Motor Truck Corporation stock in the manner requested. In holding that the Motor Corporation stock received by the estate upon payment of the note repaid it for the amount paid out, the Commissioner acted upon the

claim of the estate for a deduction on account of payment of this note. This suit was not instituted until more than two years after that decision. Plaintiff is, therefore, not entitled to recover on this item. The Old Reliable Motor Truck Corporation was discharged in bankruptcy July 10, 1927. The loss, if any, which may have been sustained by the estate on that account was a deduction properly to be allowed from income in the year in which the loss was sustained. That question is not before us.

Judgment for the amount due plaintiff will be entered upon the filing of a computation of the amount of the overpayment in estate tax in accordance with this opinion. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

UNITED STATES FIDELITY & GUARANTY COMPANY v. THE UNITED STATES

[No. 42429. Decided December 6, 1937]

On the Proofs

Liability of surety; payment under mutual mistake of fact.—Surety having, under mutual mistake of fact, paid amount alleged to be due by contractor by reason of default, is entitled to recover, where in *Gertner* v. *United States*, 76 C. Cls. 643, it was held that contractor was not in default and was not liable for the damage to the work.

United States v. *State Bank*, 96 U. S. 30, 36; *Nelson* v. *United States*, 35 C. Cls., 427, 429, cited.

The Reporter's statement of the case:

Mr. Louis M. Denit for the plaintiff. *Brandenburg & Brandenburg* were on the brief.

Mr. Paul A. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, United States Fidelity & Guaranty Company, was surety on the bond of L. Gertner, Sr., in the penal sum of $29,000, for the faithful performance of his contract with the United States entered into June 28, 1926, for the construction of a power plant and laundry building and installation of a heating system and refrigeration plant at Hot Springs, Arkansas, in respect to which the principal recovered a judgment in this court against the United States, January 9, 1933, in an amount of $9,992.00 (docket No. K-438).

2. During the course of the contract work and as a part thereof, the contractor, the said Gertner, constructed an underground steam distribution system or conduit, a part whereof reached to the new laundry building on the site of the work.

Early in December of the year 1926, heavy rains accumulated surface water in and around the laundry building and notwithstanding the protests of the contractor the contracting officer diverted into the distribution system so constructed the accumulated water, flooding and ruining a substantial section thereof.

The work was inspected and tested in March 1927, found by the contracting officer to be in an unsatisfactory condition, due to the flooding, and on July 27, 1927, the contractor was by him, without justification or warrant, declared to be in default and the plaintiff herein, as surety on the bond, immediately given an opportunity to complete the work. This the plaintiff rejected.

The work was readvertised, the plaintiff advised of the bids, of which $16,900 was the lowest, and given the election of completing the work or of remitting $6,908, representing the difference between the lowest bid and that part of the contract price then unpaid, viz, $9,992. The surety company, plaintiff herein, again, November 11, 1927, refused to complete the work, but shortly thereafter elected to and did remit to the contracting officer the difference of $6,908, and the work was relet to and finished by the lowest bidder.

3. Present at the tests conducted in March 1927, on Gertner's installation, was one Moriarty, a representative of

the United States Fidelity & Guaranty Co., plaintiff herein, who was a lawyer and engineer. Moriarty thereafter reported his inspection to the plaintiff.

After plaintiff's second refusal to complete the work, November 11, 1927, the quartermaster general had a conference with a representative of the plaintiff and stated that the conduit had been condemned and that the contractor had defaulted in substantial respects in the performance of his work. The question of advancing $6,908 was discussed and the quartermaster general reiterated his statement that the contractor had defaulted in the performance of the contract and because thereof the conduit had been condemned and would not pass the test.

The quartermaster general did not inform the plaintiff that the conduit had been flooded by the defendant in December 1926, entirely destroying its efficiency and that this was responsible for the necessity of obtaining new bids to replace the conduit. Plaintiff paid the sum of $6,908 to the defendant in reliance upon the truth and accuracy of the representations made, and without conducting an independent investigation to ascertain their truth and accuracy. The representations made to the plaintiff and which induced it to pay this sum were not true and correct. At the date of the payment, neither the plaintiff nor the quartermaster general had knowledge that the failure of the conduit was caused solely by the flooding thereof by the constructing quartermaster, or that the contractor was not in default, and had the plaintiff been advised of the same, it would not have paid the said sum of $6,908, or any part thereof.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

Plaintiff brings this action to recover a sum of money paid by it to the defendant under a mutual mistake of fact. Plaintiff was the surety on the bond of the contractor who had a contract with the defendant which was declared forfeited by the defendant and the plaintiff was called upon to make good the difference between the amount due the contractor and the amount of the second contract for the completion of the work.

Syllabus

At the time of the payment by the plaintiff, both the contracting officer and the plaintiff were under the impression that the plaintiff's principal was liable for the damage to the work. In the case of *L. Gertner, Sr.* v. *United States*, 76 C. Cls. 643, it was held that the contractor was not in default and was not liable for the damage to the work. Neither the Quartermaster General nor the plaintiff knew that the damage to the conduit was due to the action of the Construction Quartermaster when the payment was made. There was no default on the part of plaintiff's principal. Under these circumstances it is palpably clear that the payment was made under a mutual mistake of fact and, accordingly, the Government has no right to retain it. In the case of *United States* v. *State Bank*, 96 U. S. 30, 36, the Supreme Court said:

> But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.

See *Nelson* v. *United States*, 35 C. Cls. 427, 429.

Plaintiff is entitled to a judgment for the sum of $6,908.00. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HENRY B. ROBBINS v. THE UNITED STATES

[No. 42441. Decided December 6, 1937]

On the Proofs

Income tax; claim for refund based on valuation of bonus stock; estoppel—Where plaintiff in 1923 received 2,500 shares of stock as additional compensation and did not report same in his income tax return for that year, on the basis that it was a not closed transaction, he is estopped from claiming refund on his income tax for 1928 and 1929 based on difference between

Reporter's Statement of the Case

selling price of shares sold in these years and alleged valuation in 1923. See *Mahoning Investment Company* v. *United States*, 78 C. Cls. 231, 248; *Rothschild* v. *Title Guarantee & Trust Co.*, 204 N. Y. 458; *R. H. Stearns Co.* v. *United States*, 291 U. S. 54 cited.

The Reporter's statement of the case:

Mr. Allen G. Gartner for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Great Neck, Long Island, New York.

2. Plaintiff has been engaged in the fish business since 1899 and has been very successful in that business. He was first employed by his father and later taken into the firm which then became I. W. Robbins & Son. Subsequently the name of the company was changed to Robbins & Robbins, which became a subsidiary of the Atlantic Coast Fisheries Company prior to 1922.

3. About the beginning of 1922, but prior to April 3rd of that year, the National Fisheries Company acquired all the assets of the Atlantic Coast Fisheries Company. Later the name National Fisheries Company was changed to the Atlantic Coast Fisheries Company. The old company of that name (Atlantic Coast Fisheries Company) was dissolved following the sale of its assets to the National Fisheries Company.

4. Shortly after the acquisition by the National Fisheries Company of the assets of the old Atlantic Coast Fisheries Company the former company sought the services of plaintiff and Henry S. Chesebro, plaintiff in a related proceeding, as experienced men in the line of business in which the company was engaged. In order to secure the services of plaintiff a contract was entered into April 3, 1922, between plaintiff and the National Fisheries Company under the terms

of which plaintiff was employed by the National Fisheries Company for a period of five years (unless such employment should be terminated by the Board of Directors within that time upon thirty days' notice) at an annual salary of $15,000. The contract also provided, with certain limitations and conditions not here material, as follows:

> The party of the first part [National Fisheries Company] further covenants and agrees that the party of the second part [plaintiff] shall, subject to his death or the termination of this contract, before the expiration of five years receive from the party of the first part [National Fisheries Company] as additional compensation for his services hereunder twenty-five hundred (2,500) shares of the common capital stock, having no par or face value, of the party of the first part [National Fisheries Company], provided, however, and upon condition that the net earnings of the party of the first part [National Fisheries Company] applicable to the payment of dividends shall for at least one of the calendar years 1922, 1923, 1924, 1925, and 1926 amount for that calendar year to a sum equal to 7% upon the par value of the preferred capital stock of the party of the first part [National Fisheries Company] issued and outstanding at the close of such calendar year. At the end of the first of said calendar years in which the net earnings of the party of the first part [National Fisheries Company] applicable to the payment of dividends, shall amount to said sum, the party of the first part [National Fisheries Company] covenants and agrees to deliver to the party of the second part [plaintiff] certificates for twenty-five hundred (2,500) shares of its common capital stock, without par or face value, and the said shares shall be full paid and non-assessable.

5. The conditions of the employment contract referred to in finding 4, entitling plaintiff to receive stock, were fulfilled by or before the end of the calendar year 1922, and March 9, 1923, the Atlantic Coast Fisheries Company (name changed from National Fisheries Company) issued to plaintiff 2,500 shares of its capital common stock as provided by the contract. The stock had a fair market value at the time it was received by plaintiff of $15 per share.

6. Plaintiff's individual income tax return for the calendar year 1923 disclosed a net income of $10,268.63, and a tax

liability of $514.86. However, in that return plaintiff did not report as income the value of the 2,500 shares of the Atlantic Coast Fisheries Company stock which was received by him in that year, as shown in finding 5, for the reason that plaintiff proceeded on the basis that no income would arise therefrom until the stock was converted into cash.

7. During 1928 plaintiff sold 200 shares, and in 1929, 900 shares, out of the total of 2,500 shares of the common stock of the Atlantic Coast Fisheries Company received in 1923, as shown in finding 5.

8. March 15, 1929, plaintiff filed his individual income tax return for the calendar year 1928 and reported therein a net income of $20,145.29, a tax on capital gain of $27,907.51, and a total tax liability of $28,490.08, which was paid in quarterly installments of $7,122.52 on March 18, June 13, September 16, and December 14, 1929. The tax on capital gain referred to above was computed on the sale of property reported in Schedule D of the return as follows:

Kind of property	Date acquired	Date sold	Amount received	Cost	Net gain
2,226 shares Atlantic Coast Fisheries stock	Dec. 14, 1922 Mar. 9, 1923	1928	$256,189.04	$32,929.00	$223,260.04

Included in the amount shown above as received for the stock sold in 1928 was an amount received from the sale of 200 shares of the stock of the Atlantic Coast Fisheries Company which was issued to plaintiff March 9, 1923, under the employment contract referred to in finding 4. In reporting the foregoing sale of the 200 shares no cost or value was assigned thereto.

9. March 17, 1930, plaintiff filed his individual income tax return for the calendar year 1929, reporting therein a net income of $21,860.02, tax on capital gain of $25,613.61, and a total tax liability of $26,340.50, which was paid in quarterly installments of $6,585.13 on March 17, June 16, September 16, and December 15, 1930. The tax on capital gain referred to above was computed on the sale of property reported in Schedule D of the return as follows:

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Kind of property	Date acquired	Date sold	Amount received	Cost or value as of March 1, 1913	Net gain
Stock Atlantic Coast Fisheries Company.	1922-3	Jan. to June, 1929	$226,605.00	$21,696.12	$204,908.88

Included in the amount shown above as received for the stock of the Atlantic Coast Fisheries Company sold in 1929 was an amount received from the sale of 900 shares of the stock which was issued to plaintiff March 9, 1923, under the employment contract referred to in finding 4. In reporting the foregoing sale of the 900 shares no cost or value was assigned thereto.

10. March 12, 1931, plaintiff filed a claim for refund of $20,000 for 1928, alleging as grounds therefor the following:

> In the income tax return for 1928, the deponent failed to deduct, and the Department failed to allow an amount of $155,820.00, as cost of 2,226 shares of Atlantic Coast Fisheries Company stock which were sold in 1928 and reported in Schedule D. The stock was received in 1923 for services rendered and the fair value of the stock in 1923 was $70.00 per share. Upon the sale of the stock received for services, the basis or cost is the fair market value of the stock at the time such stock was received. (Appeal of W. R. Jacques, 4 B. T. A. 56). The stock having a value of $70.00 per share in 1923, the cost of 2,226 shares received for services and sold in 1928, or $155,820.00, should be allowed as a deduction in Schedule D in determining the net profit subject to tax.

11. March 12, 1931, plaintiff filed a claim for refund of $20,000 for 1929, alleging the following grounds therefor:

> In the income tax return for 1929, the deponent failed to deduct, and the Department failed to allow, an amount of $19,180.00, as cost of 274 of the 2,653 shares of the Atlantic Coast Fisheries Company stock, which were sold in 1929 and reported in Schedule D. The stock was received in 1923 for services rendered and the fair value of the stock in 1923 was $70.00 per share. Upon the sale of the stock received for services, the basis or cost is the fair market value of the stock at the time such stock was received. (Appeal of W. R. Jacques, 4 B. T. A. 56). The stock having a value of

$70.00 per share in 1923, the cost of 274 shares received for services and sold in 1929, or $19,180.00, should be allowed as the cost of the 274 shares in Schedule D, in determining the net profit subject to tax. The cost of the remaining 2,379 shares which were purchased aggregated $54,625.12 instead of $21,696.12, as shown on the return.

12. December 8, 1932, the Commissioner advised plaintiff that his claims for refund for 1928 and 1929 would be rejected, assigning as the principal reason therefor the following:

> In 1923, when the stock of the Atlantic Coast Fisheries Company was received, you considered the proceeding a *not closed* transaction for Federal income tax purposes, made your return for that year upon that basis, which was allowed by the Bureau, and thereby avoided the payment of tax upon the fair market value of the stock. You are, therefore, now estopped from asserting your present claim in connection with the sales made in 1928 and 1929 of the stock received in 1923. You are not now entitled to use the fair market value of the stock as the basis for reducing the total proceeds from the sale in arriving at the taxable profit for the years 1928 and 1929. It is considered that since you chose to treat the receipt of the stock in 1923 as a *not closed* transaction and accepted and retained substantial benefits by then adopting such a position, you are estopped to change your position now and claim a basis to which otherwise you might be legally entitled.

The claims were formally rejected on a schedule dated December 29, 1932.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The evidence shows that in 1922 the plaintiff entered into a contract with the National Fisheries Company under the terms of which he was to receive an annual salary in cash and in addition a certain amount of capital stock, provided the net earnings of the company should amount to a certain sum for one of specified years. This condition was fulfilled before the end of the calendar year 1922, and in March

1923, the company issued to the plaintiff 2,500 shares of its stock in accordance with the contract which at the time was fairly worth $15 a share.

Plaintiff made an income tax return for the calendar year 1923 but did not set out as income the value of the 2,500 shares of stock so received by him, as stated above, for the reason that in making up his return he proceeded on the basis that no income would arise therefrom until the stock was converted into cash; or, in other words, plaintiff in making his return for 1923 took the position that no tax should be assessed on account of his having received the stock in that year.

During the year 1928 the plaintiff sold 200 shares of the stock received by him in 1923, and in 1929 he sold 900 shares of this stock. His income tax return for the calendar year 1928 was filed on March 15, 1929, and disclosed a net income of $20,145.29, a tax on capital gain of $27,907.51, and a total tax liability of $28,490.08 which was duly paid.

Plaintiff also filed his income tax return for the calendar year 1929 prepared in the same manner as for 1928. Included in the net gain reported on the sale of the stock for both years was the entire amount received for the shares issued to him under the contract and the cost or value at the date of issuance was not stated.

In March, 1931, the plaintiff filed separate claims for refund of taxes paid for the years 1928 and 1929 as stated in Findings 10 and 11. These claims were based on the ground that he was entitled to use the fair market value of the stock at the time it was received as the basis for determining the net profit subject to tax for the respective years. The refund claims were rejected by the Commissioner on the ground that the plaintiff was estopped from making this claim. This constitutes the sole issue in the case.

It will be observed that plaintiff now claims that he is entitled to deduct the value of the stock when acquired from its value when sold in order to ascertain the amount of tax for the year of sale. This is equivalent to a claim that the value of the stock when acquired should have been assessed for the year in which it was received. But it was too late to do this when the refund claims were filed, and

up to that time the defendant had no notice or knowledge that plaintiff would make such a claim. On the contrary it had every reason to believe from the returns which plaintiff made that he would not do so.

In view of the fact that at the time the claims for refund were filed the statute of limitations had run against assessing a tax on the receipt of the stock during 1923, we are clear the Commissioner was right in holding that the plaintiff was estopped from setting up these claims. The plaintiff cites a decision of the Board of Tax Appeals as showing the necessary elements of an estoppel but we have extended the rule much farther than stated in the quotation from the decision of the Board and have, as we think, abundant authority for such action.

The plaintiff, it is true, made no representation of any kind to the defendant and no intent to defraud is shown. It also does not appear that the plaintiff intended to mislead the defendant, but none of these things are necessary under what we have held to be the correct doctrine.

The estoppel which arises in the case now before us and in similar cases is called an equitable estoppel, sometimes referred to as a quasi estoppel, the doctrine of which has been extended by the modern courts to prevent a wrong being done "wherever, in good conscience and honest dealing" a party ought not to be permitted to repudiate his previous statements, declarations, or actions. See *Mahoning Investment Co.* v. *United States*, 78 C. Cls. 231, 248, and the case of *Rothschild* v. *Title Guarantee & Trust Co.*, 204 N. Y. 458, cited therein. In the last named case it was held that—

> When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable. (*Vohmann* v. *Michel*, 185 N. Y. 420; 2 Pomeroy's Equity Jurisprudence (3d ed.), sections 816–821, 965.)

It is not necessary, however, that we should find or hold that an estoppel has been shown. There is a broader principle the application of which will defeat plaintiff's action. In the case of *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, the Supreme Court had under consideration acts of a nature similar to those which appear in the case at bar and said:

> Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. *Imperator Realty Co.* v. *Tull*, *supra.* [228 N. Y. 447.] A suit may not be built on an omission induced by him who sues.

The failure to report any income arising by reason of the receipt of stock in 1923 brought about the omission by the government officials of an assessment of tax thereon. There is no presumption that the government officials knew plaintiff had received valuable stock in 1923 and the evidence fails to show that they did. Whatever the fact may be in this respect, it would not affect the responsibility of plaintiff upon whom the duty was cast to report the transaction. In the recent case of *Alamo Nat. Bank of San Antonio, Exr.*, v. *Commissioner*, 36 B. T. A. 402, a similar issue arose and the Board said it was not necessary to determine whether the facts brought the case within the technical rules applicable to the doctrine of estoppel for a more fundamental consideration was involved. Also that—

> By failing to report as income in 1921 any value on account of the franchise received by them upon the liquidation of the bottling company, the petitioners in effect declared that such franchise had no value at that time. * * * Limitations having run, petitioners can not now change their position and take advantage of their own error by claiming a value for the franchise in 1921 in computing the gain derived from its sale in 1931. *Stearns Co.* v. *United States*, 291 U. S. 54.

A number of other authorities could be cited to sustain the rule laid down in these cases but we do not think it is

necessary. The plaintiff can not now be permitted to change the position which he took with reference to the taxes of 1923 and his petition must be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

HENRY S. CHESEBRO v. THE UNITED STATES

[No. 42442. Decided December 6, 1937]

On the Proofs

Income tax; claim for refund based on valuation of bonus stock.—This case was decided upon the authority of *Robbins* v. *U. S.* reported herein, page 39.

The Reporter's statement of the case:

Mr. Allen G. Gartner for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Manhassett, Long Island, New York.

2. Plaintiff was born in 1887, and has been engaged in the fish business since he was fifteen years of age when he was employed by his father who was engaged in that business. By 1909 or 1910 he had been promoted to manager of the business, which was known as Chesebro Brothers. He was very successful in that business. The aforementioned Chesebro Brothers or its successor became a subsidiary of the Atlantic Coast Fisheries Company.

3. About the beginning of 1922, but prior to April 3rd of that year, the National Fisheries Company acquired all the assets of the Atlantic Coast Fisheries Company. Later the National Fisheries Company changed its name to the Atlantic Coast Fisheries Company. The old company of that name (Atlantic Coast Fisheries Company) was dissolved following the sale of its assets to the National Fisheries Company.

4. Shortly after the acquisition by the National Fisheries Company of the assets of the old Atlantic Coast Fisheries Company, the former company sought the services of plaintiff and Henry B. Robbins, plaintiff in a related proceeding, as experienced men in the line of business in which the company was engaged. In order to secure the services of plaintiff a contract was entered into April 3, 1922, between plaintiff and the National Fisheries Company under the terms of which plaintiff was employed by the National Fisheries Company for a period of five years (unless such employment should be terminated by the Board of Directors within that time upon thirty days' notice) at an annual salary of $15,000. The contract also provided, with certain limitations and conditions not here material, as follows:

> The party of the first part [the National Fisheries Company] further covenants and agrees that the party of the second part [plaintiff] shall subject to his death or the termination of this contract before the expiration of five years receive from the party of the first part [the National Fisheries Company] as additional compensation for his services hereunder twenty-five hundred (2,500) shares of the common capital stock, having no par or face value, of the party of the first part [the National Fisheries Company], provided, however, and upon condition, that the net earnings of the party of the first part [the National Fisheries Company] applicable to the payment of dividends shall for at least one of the calendar years 1922, 1923, 1924, 1925, and 1926 amount for that calendar year to a sum equal to 7% upon the par value of the preferred capital stock of the party of the first part [the National Fisheries Company] issued and outstanding at the close of such calendar year. At the end of the first of said calendar years in which the net earnings of the party of the first part [the National Fisheries Company], applicable to the payment of dividends, shall amount to said sum, the party of the first part [the National Fisheries Company] covenants and agrees to deliver to the party of the second part certificates for twenty-five hundred (2,500) shares of its common capital stock, without par or face value, and the said shares shall be full paid and non-assessable.

5. The conditions of the employment contract referred to in finding 4 entitling plaintiff to receive stock, were fulfilled by or before the end of the calendar year 1922, and March 9, 1923, the Atlantic Coast Fisheries Company (name changed from National Fisheries Company) issued to plaintiff 2,500 shares of its capital common stock as provided by the contract. The stock had a fair market value at the time it was received by plaintiff of $15 a share.

6. March 15, 1924, plaintiff filed his individual income tax return for the calendar year 1923, disclosing a net income of $13,767.68 and a tax liability of $882.34. In that return plaintiff did not report as income the value of the 2,500 shares of stock of the Atlantic Coast Fisheries Company which was received by him in that year as shown in finding 5, for the reason that plaintiff proceeded on the basis that no income would arise therefrom until the stock was converted into cash.

7. During 1928 plaintiff sold 1,000 shares out of the total of 2,500 shares of the common stock of the Atlantic Coast Fisheries Company received in 1923, as shown in finding 5.

8. March 16, 1929, plaintiff filed his individual income tax return for the calendar year 1928 and reported therein net income of $15,294.27, tax on capital gain of $26,126.88, and a total tax liability of $26,346.78, which was paid in three quarterly installments of $6, 586.71 on March 16, June 15, and September 16, 1929, and a fourth installment on December 16, 1929, of $6,586.65. The tax on capital gain shown in the return was computed on the sale of property reported in Schedule D of the return as follows:

Kind of property	Date acquired	Date sold	Amount received	Cost	Net gain
Atlantic Coast Fisheries Company stock	1922	1928	$209, 015	None	$209, 015

Included in the amount shown above as received for stock sold in 1928 was the amount received from the sale of 1,000 shares of the stock of the Atlantic Coast Fisheries Company which was issued to plaintiff March 9, 1923, under

the employment contract referred to in finding 4. In reporting the above sales in 1928 no cost or value was assigned to the stock received March 9, 1923.

9. March 17, 1930, plaintiff filed his individual income tax return for the calendar year 1929 reporting therein a loss of $2,292.05, tax on capital gain of $19,399.25, and a total tax liability of $19,361.25, which was paid in three quarterly installments of $4,840.31 on March 17, June 16, and October 16, 1930, and a fourth installment of $4,840.32 on December 15, 1930. The tax on capital gain shown in that return was computed on the sale of property shown in Schedule D of the return as follows:

Kind of property	Date acquired	Date sold	Amount received	Cost or value as of March 1, 1913	Net gain
Atlantic Coast Fisheries Company stock	1922	1929	$160, 894. 00	$5, 700. 00	$155, 194. 00

The record fails to substantiate the contention made in plaintiff's claim for refund for 1929 to the effect that some of the above stock sold in 1929 was out of the 2,500 shares of the stock of the Atlantic Coast Fisheries Company which was received as shown in finding 5.

10. March 9, 1931, plaintiff filed a claim for refund for 1928 in the amount of $20,000 assigning as grounds therefor the following:

> In the income tax return for 1928 the deponent failed to deduct, and the Department failed to allow, an amount of $65,910.00 as cost of the 933 shares of Atlantic Coast Fisheries Company stock which were sold in 1928 and reported in Schedule "D." The stock was received in 1923 for services rendered and the fair value of the stock was $70.00 per share. Upon the sale of stock received for services, the basis or cost is the fair market value of the stock at the time such stock was received, i. e. 1923. (Appeal of W. R. Jacques, 4 BTA 56). The stock having a value of $70 per share in 1923, the total cost of the 933 shares sold in 1928, or $65,910.00, should be allowed as a deduction in Schedule "D" in determining the net profit subject to tax.

On the same day, March 9, 1931, plaintiff also filed a claim for refund for 1929 in the amount of $15,000 and assigned the same grounds therefor as in the claim for 1928 except a cost of $109,690 was claimed in determining profit on the sale of 1,567 shares of stock of the Atlantic Coast Fisheries Company alleged to have been sold in 1929 out of stock received in 1923.

11. December 8, 1932, the Commissioner advised plaintiff that his claims for refund for 1928 and 1929 would be rejected and gave as his principal reason for such action the following:

> In 1923, when the stock of the Atlantic Coast Fisheries Company was received, you considered the proceeding a *not closed* transaction for Federal income tax purposes and made your return for that year upon that basis, which was allowed by the Bureau, and thereby avoided the payment of tax upon the fair market value of the stock. You are, therefore, now estopped from asserting your present claim in connection with the sales made in 1928 and 1929 of the stock received in 1923. You are not now entitled to use the fair market value of the stock as the basis for reducing the total proceeds from the sale in arriving at the taxable profit for the years 1928 and 1929. It is considered that since you chose to treat the receipt of the stock in 1923 as a *not closed* transaction and accepted and retained substantial benefits by then adopting such a position, you are estopped to change your position now and claim a basis to which otherwise you might be legally entitled.

The claims were formally disallowed on a schedule dated December 29, 1932.

12. As a result of an examination of plaintiff's books a certificate of overassessment was issued in favor of plaintiff for 1929 for $269.63, and that amount together with interest of $22.22 was refunded to plaintiff January 30, 1933. The refund was based on items not involved in this suit.

Upon the authority of *Robbins* v. *United States*, *ante*, p. 39, the court decided that the plaintiff was not entitled to recover.

NILS P. SEVERIN AND ALFRED N. SEVERIN, CO-PARTNERS DOING BUSINESS UNDER THE NAME OF N. P. SEVERIN COMPANY v. THE UNITED STATES

[No. 42480. Decided December 6, 1937]

On the Proofs

Claim for extra compensation under Government contract; prior notice of contingencies.—Where contractor had notice from the advertisement for bids that dredging operations would be performed before or after the contract was executed which would result in deposit of silt on the site of the work which it would be necessary to remove, and contractor did remove not only the quantity for which the contracting officer allowed payment, but also an additional amount, there can be no recovery under the terms of the contract.

Same.—Where the specifications plainly provided for the contingency of unexpected depths in reaching bedrock, and the bidders were aware of that contingency, there can be no recovery to compensate for failure to calculate the bid so as to include the contingency.

Extra work and equipment unforeseen.—Where Government has ordered extra work performed and has received the benefit thereof; where additional equipment is furnished; where drains could not be laid as shown on the drawings and an extra cost was entailed—recovery is allowed.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiffs. *Mr. Bynum E. Hinton* and *King & King* were on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are co-partners doing general construction work under the name of N. P. Severin Company, with office at Chicago, Illinois.

Prior to the time of the contract work hereinafter described they had constructed numerous schools, residences, churches, commercial buildings, and Federal Government buildings, and had been in the construction business for

many years. They had never constructed a bridge of any considerable size, their bridge work being confined to small bridges on private estates.

2. On December 29, 1928, plaintiffs as co-partners under the name of N. P. Severin Company entered into a contract with the defendant, represented by U. S. Grant, 3d, Executive and Disbursing Officer, Arlington Memorial Bridge Commission, as contracting officer, whereby plaintiffs agreed to furnish all labor and material and perform all work required for the construction of the Boundary Channel Bridge of the Arlington Memorial Bridge Project, Washington, D. C., in accordance with their accepted bid and specifications, schedules, and drawings which were made a part of the contract, for the consideration of $338,000 and certain unit prices for possible additional contract work, the work to commence on or before January 28, 1929, and be finished on or before February 2, 1930.

Included in the specifications were the following provisions, not attached to and made a part of the printed petition in this case:

> 82. * * * The granite will be turned over to the contractor and stored in an orderly manner in the storage yard maintained by the United States at the site of the bridge on the Virginia shore. All of it will lie within the reach of a 45-ton crane traveling upon a standard gauge sidetrack, and the maximum weight of any single block will not exceed 15 tons. * * *
>
> 84. None of the granite carving indicated on the contract drawings is included with the work of this contract, as all of the stones will have been carved when the granite is turned over to the contractor to be set.
>
> The contractor * * * shall be responsible for all damage to the carved stones resulting either from his operations or from the carelessness of any of his employees. * * *
>
> 89. * * * In general, the holes, chases, etc., to receive the anchorage have been cut on the various blocks as indicated on the contract drawings, but the contractor shall cut all others that may be necessary at his own expense. * * *

There was a note on the contract drawings:

> Eagles on the pylons will be carved before the granite is turned over to the contractor.

The contract drawings of the foundations showed two lines in a scaled profile along the axis of the bridge designated severally "mud" and "rock," with the notations "local variations may be five feet either way from levels indicated," and the "contractor shall do all excavating and backfilling necessary for the construction of foundations and superstructure or as indicated on the drawings."

Copy of the contract, specifications, and drawings is filed in the case and made part hereof by reference.

3. The bridge to be constructed is described as follows:

> The Boundary Channel Bridge consists of a single masonry span, 100 feet in clear length, connecting Columbia Island to the Virginia mainland, with an underpass span at each end to accommodate low level driveways parallel to the Boundary Channel. It is a reinforced concrete structure faced with granite; it is approximately 403 feet in length overall, and 94 feet in width, face to face of spandrel walls. The underpasses are girder spans of which the dead load is carried by structural steel trusses.

The Boundary Channel is a branch of the Potomac River from 100 to 200 feet in width and from 4 to 6 feet in depth, separating Columbia Island from the Virginia mainland.

4. Prior to making their bid plaintiffs visited the site of the project, made no borings, but for the purpose of finding out what the subsurface conditions were with respect to foundations examined the interior of a cofferdam near the center of the Potomac River, then being used for the construction of the Arlington Memorial Bridge nearby, and found the bottom of the cofferdam to be of live hard rock, prepared and about ready for pouring of concrete. There was very little unattached rock and no decomposed rock.

Before operations began both plaintiffs and defendant had made wash borings at the site to determine the location of rock beneath the surface, and both investigations indicated presence of rock substantially at the "rock" line shown in the contract drawings, Sheet 16. These investigations

were not adequate to determine that the interference encountered in the borings was bedrock. Defendant's borings had been made as a basis for the drawings and specifications; plaintiffs' had been made after the contract had been awarded. Both parties had good reason to suppose and they did suppose that the "rock" line so drawn indicated where bedrock was located, basing their suppositions upon the conditions met with in the construction of the Arlington Memorial Bridge, but neither knew what the conditions were in fact as to presence and location of bedrock.

Plaintiffs' superintendent on the job was without satisfactory qualifications for the building of bridges and one of his principal assistants was a young engineer, who had graduated from an engineering school three years previously and whose experience had been limited to work as a surveyor, inspector, and engineer for the Federal Government during the period immediately succeeding his graduation.

At no time did plaintiffs furnish the defendant with a schedule of their contemplated progress, although repeatedly requested so to do.

5. The bids on the contract work were opened October 5, 1928, and plaintiffs were found to be the low bidders. On October 26, 1928, the Government resumed hydraulic dredging operations on Columbia Island, by which the island was being built up. The dredging operations deposited silt upon the site of the work on Columbia Island, adding to the amount of earth which it was there necessary for plaintiffs to remove. Plaintiffs in January and February 1929 protested to the contracting officer that removal of the additional fill was outside the contract work, and the contracting officer February 27, 1929, authorized its removal.

Plaintiffs were late in starting the work of excavation. The necessary derricks were not procured by them and rigged until about the middle of March 1929. There was nothing to prevent their starting operations on the Virginia side at the end of January 1929.

Plaintiffs began excavating on Columbia Island March 6, 1929. They were prevented from starting earlier by

reason of the unstable condition of the fill, the fill not having before that time dried out sufficiently to handle. Floating, instead of dry-land equipment, was used initially at that time due to the wet condition of the earth, and plaintiff's desire to get ahead with the work.

The Government's dredging operations ceased March 14, 1929.

On June 28, 1929, the contracting officer gave plaintiffs a written order to remove 3,618 cubic yards of earth at the east end of the bridge, on Columbia Island, payment to be made under Article 33 of the specifications. This material was confined to the bridge site, included only material pumped in after the opening of bids, and included no material surrounding or adjacent to the bridge site.

The 3,618 cubic yards mentioned in the contracting officer's order for removal, was yardage calculated by the plaintiffs to be chargeable to the Government out of a total of 6,588 cubic yards, 3,618 cubic yards being the fill deposited in the hydraulic dredging operations after plaintiffs had made their bid. For the 3,618 cubic yards plaintiffs claimed and were paid by the contracting officer $5,307.62, which was cost of labor and material, including plank road, overhead, profit, and bond. The underlying 2,970 cubic yards became saturated by the overburden of 3,618 cubic yards and entailed additional expense in removal.

The cost of excavating the remaining 2,970 cubic yards, underlying the fill of 3,618 cubic yards allowed by the contracting officer, in excess of a dry earth operation, was $2,978.34, exclusive of overhead, profit, and cost of bond. Including overhead, profit, and cost of bond, it amounts to $3,476.47.

The wet and unstable condition of the fill necessitated the use of mats and plank roads to prevent the miring of machinery and equipment. The cost of construction and maintenance thereof was $5,039.24 exclusive of overhead, profit, and cost of bond. Including them, it amounts to $5,882.06. Included in the allowance of $5,307.62 by the contracting officer, was approximately the sum of $268.38 for cost of construction and maintenance of mats and plank

roads applicable to the allowance of 3,618 cubic yards. This amount deducted from $5,882.06 leaves $5,613.68.

Certain excavation was necessary for derricks on Columbia Island. The cost of excavation of the wet fill for that purpose, placed after bidding, plus the extra cost of excavating the earth thereunder, due to its saturated condition, over the cost of excavating dry earth, amounts to $1,306.72, exclusive of overhead and profit, and cost of bond. Adding these three elements, the aggregate cost was $1,525.27.

Plaintiffs were put to an expense of $970, exclusive of overhead, profit, and cost of bond, for the floating equipment used by them initially in the operations on Columbia Island. Including overhead, profit, and cost of bond, the expense amounts to $1,132.23.

6. The excavation for the abutment on the Columbia Island end of the bridge was completed July 10, 1929. No bedrock was revealed at the depths shown in the drawings as "rock" line, but instead were exposed gravel and boulders, which were unsuitable for foundations. These were excavated by the plaintiffs until at about seven feet in general decomposed rock was uncovered, which was likewise unsuitable. Plaintiffs washed and cleaned the decomposed rock for Government inspection. After inspection the defendant's officers ordered the rock to be dug into and this was done, from 6 inches to two and a half feet, at which point excavation was ordered stopped. The rock was cleaned for inspection, and a sufficient bearing surface having, in the opinion of the Government engineers, been found plaintiffs were ordered to begin pouring concrete.

The cost to the plaintiffs of cleaning the bottom of the excavation the second time was $744.62, exclusive of overhead, profit, and cost of bond. Including them, the cost is $869.15.

By reason of the increased depth of the Columbia Island abutment excavation, over the limit indicated by the "rock" line in the contract drawings, pumping the water from the excavation was necessary during the time of the additional excavation. The cost thereof to plaintiffs, exclusive of overhead, profit, and cost of bond, was $1,933.39. Including these three factors, the cost amounted to $2,256.75.

Reporter's Statement of the Case

The additional excavation for the Columbia Island abutment caused an additional expense to plaintiffs in labor and material, amounting to $1,429.36, exclusive of overhead, profit, and bond, on the cofferdam above the aforesaid "rock" line. Including them, the cost is $1,668.42. For additional cost thereof below the "rock" line plaintiffs have been fully reimbursed.

Plaintiffs began the pouring of concrete for the Columbia Island abutment July 11, 1929, and completed the pouring July 18, 1929. The amount of concrete poured over and above that necessary had bedrock been exposed at the contract drawing "rock" line was 771.52 cubic yards. At a price of $12 per cubic yard this amounts to $9,258.24.

7. On the Virginia end of the Boundary Channel Bridge plaintiffs started excavating for the abutment March 19, 1929, and completed removing earth April 5, 1929, at which time they uncovered rock. The rock apparently being soft, plaintiffs washed it off sufficiently to find out how much of it was in that condition, and it was inspected by the Government. Plaintiffs were told by defendant's officers to excavate the rock and keep on excavating until further orders, as it was not hard and solid enough for a bearing surface. On April 6, 1929, plaintiffs began its removal by air compressors and rock-drilling tools, stopped excavation May 20, 1929, at the Government's direction, and plaintiffs again washed it off, this time in order to furnish a clean and proper bond between rock and concrete. This second washing was done June 8 to 17, 1929, at a labor cost of $292.48, exclusive of overhead and profit, and cost of bond. Adding these extra elements, the amount is $341.40.

The cofferdam for the Virginia abutment had to be adjusted to the lower depth resulting from the rock excavation. It was necessary to shift and reset the two lower sets of bracing in the cofferdam. The cost of labor and derricks for the readjustment of bracing was $782.62, not including overhead, profit, and cost of bond. Including them, the amount is $913.51.

During the period of rock excavation in the Virginia cofferdam, the cofferdam had to be kept dry by pumping.

The cost of pumping during the time of such rock excavation was $649.49, exclusive of overhead, profit, and cost of bond. Including them, the cost is $758.11.

The rock in the Virginia cofferdam was excavated at depths averaging about nine feet below the contract drawing "rock" line, without reaching bedrock. The Government then ordered plaintiffs to commence the pouring of concrete in the excavation, its officers being of the opinion that sufficient bearing had been found, and this operation was begun June 7, 1929, and completed about June 18, 1929. In this operation plaintiffs poured 836.26 more cubic yards of concrete than they would have poured had bedrock been encountered at the "rock" line disclosed in the contract drawings. At a rate of $12 per cubic yard this amounts to $10,035.12.

8. In excavating for foundation piers and cylinders much the same subsurface conditions were found as in the case of the two abutments, and the depths and pouring of concrete were at the direction of defendant's engineers.

On the Virginia side extra pumping during the time of additional excavation was necessary as to cylinders and the southwest pier. The cost thereof to the plaintiffs, exclusive of overhead, profit, and bond, was $675.43. Including overhead, profit, and bond, the cost amounted to $788.39.

On the Columbia Island side plaintiffs were put to an additional expense due to the increased depths of the cylinders necessary because of the lack of bearing surface at the contract drawing "rock" line. This additional expense, not including form work and concrete, and without overhead, profit, and cost of bond, amounted to $3,599.24. Including overhead, profit, and bond, the amount is $4,201.22. This cost embraces cylinder No. 40 for rock exacavation, of which plaintiffs have been reimbursed $9.37 plus overhead, profit, and bond, $1.57, total $10.94. The balance is $4,190.28.

For the piers on Columbia Island, such additional expense, not including concrete, was $6,105.33, which with overhead, profit, and cost of bond amounts to $7,126.45.

Extra concrete for the cylinders and piers, beyond that necessary had sufficient bearing been found at the "rock"

line shown on the drawing, was required and poured, and amounted to 523.13 cubic yards. At a rate of $12 per cubic yard the price would be $6,277.56.

9. The extra concrete poured into the foundation as related in findings 6, 7, and 8 aggregated 2,130.91 cubic yards, and the total price at $12 per cubic yard is $25,570.92. Of this the contracting officer allowed and paid for 1,660.2 cubic yards only, at $12 per cubic yard, or $19,922.40, a difference of $5,648.52.

10. On October 23, 1929, plaintiffs addressed a letter to the director, office of Public Buildings & Public Parks of the National Capital, stating that decomposed rock had been encountered, necessitating deeper excavations "than originally indicated or contemplated"; that the increased cost of the excavation was being ascertained; and that this condition was creating a delay which would force them into months of severe winter weather, creating further delay and increased costs.

The contracting officer replied to this October 28, 1929, as follows:

> This will acknowledge the receipt of your letter of October 23, 1929, with reference to the additional work required in connection with your contract for constructing the Boundary Channel Bridge (Arlington Memorial Bridge), due to the discovery of rotten rock and gravel which had to be excavated in order to provide suitable foundations for the bridge.
>
> It is acknowledged that the existence of this layer of unsuitable material was not suspected until it was disclosed by your operations, and that the plans and specifications did not indicate its presence. You have been paid for the additional excavation entailed as the work progressed, except for certain items that are still under discussion. For the additional concrete required in the foundations, you have been paid the sum of twelve dollars ($12) per cubic yard, in accordance with our interpretation of the provisions of paragraph 34 of the specifications, subject to the verbal protest of your representative on the job.
>
> The question of the extension of time due to the delays occasioned by the additional work will be taken up when all of the additional work shall have been completed.

We will be glad to discuss with you any matters connected with this subject, at any time that may be most convenient to you.

Following conferences between plaintiffs and the contracting officer the plaintiffs on November 14, 1929, wrote to the contracting officer stating their position in the matter, that the situation was a changed condition, involving winter work and additional cost, entitling them to an "equitable adjustment" under Articles 3 and 4 of the contract; that the additional cost was not immediately ascertainable; and that they desired an extension of time for completion.

11. Sheet 19 of the contract drawings shows what was termed at the taking of evidence, "the east end wall." It was designed to support the deck of the bridge and not as a retaining wall. The drawings showed backfilling on one side only of this wall, whereas backfilling should have been shown on both sides.

In constructing this wall plaintiffs followed the drawings, plans, and specifications and backfilled as indicated thereby. On February 20, 1930, it was discovered that the wall, as a result of backfilling on one side only, had bulged and cracked, its bottom moved out of line a maximum of 7 inches, and its top a maximum of 10 inches.

To an expert engineer it would have been apparent that there was an error in the drawing in that backfilling was shown on one side and not on both sides, and likewise it would have been apparent to him in the actual process of backfilling that the same should have been done simultaneously on both sides in order to equalize the pressure against the wall.

The attention of the Government representatives was called to the situation after the wall had thus moved out of line, and plaintiffs were required by the contracting officer to move the wall back in place and make repairs, which the plaintiffs did.

The cost to plaintiffs of restoring the east end wall to its original position, exclusive of overhead, profit, and cost of bond, was $4,335.55. Including them, the cost would be $5,060.67.

12. Certain of the stones furnished to the plaintiffs under Article 82 of the specifications were not provided with holes for the expansion bolt anchors and plaintiffs so notified the contracting officer March 12, 1930, in writing, asking for instructions.

On April 2, 1930, the contracting officer replied that under Articles 33 and 86 of the specifications this corrective work was to be done by the contractor, but that steps had been taken for doing it by the Government forces. The work, however, was done by plaintiffs' subcontractor, upon the order of the Government's granite inspector, and at an expense to them of $68.89, exclusive of overhead, profit, and cost of bond, and this expense, and charging thereof back to the Government, were approved by the inspector. With added overhead, profit, and cost of bond the charge would be increased to $80.41.

In the course of the work a piece of bullnose granite was furnished by the Government and set by the plaintiffs. After having been set it was rejected by the Government for defect in quality and ordered removed. There is no evidence of rejection or order to remove in writing. On account of the rejection and removal plaintiffs were put to an additional expense of $81.01, exclusive of overhead, profit, and cost of bond. Including overhead, profit, and bond, the cost is $94.56.

13. In the fore part of March 1930 a fire broke out under the roadway slab of one of the spans on the Columbia Island end of the bridge, and caused concrete to scale off, exposing some of the reinforcing steel. The plaintiffs were ordered to, and did, repair the damage done by the fire. On March 25, 1930, the contracting officer ordered plaintiffs to install fire protection equipment. The plaintiffs concurred in its necessity, and it was installed by them on or before April 22, 1930, at an expense of $489.98, exclusive of overhead, profit, and cost of bond. Including them, the cost amounts to $571.93.

14. The plaintiffs on March 31, 1930, requested of the contracting officers additional work orders as follows:

Our office files fail to disclose orders for additional work performed as follows:

Rock Excavation Abutment 5 and 6.
Gravel excavation Abutment 5 and 6.
Rock and gravel excavation cylinders Columbia Island and Virginia Shore.
Removal of silt, Columbia Island.
Additional bracing cofferdams.
Additional concrete foundations, Abutments, Piers, and Cylinders.
Additional Reinforcing Steel.
Additional bending of reinforcing steel.

It is requested that you kindly furnish us a copy of these orders to complete our record and file. Thanking you.

To this letter the contracting officer replied April 7, 1930:

With reference to your letter of March 31st regarding additional work performed by you, please be advised that, numbering the items in the order in which you state them in your letter, Items Nos. 1, 2, and 3 are automatically provided for under the provisions of Paragraph 48 of the specifications.

As to Item No. 4, although payment for this item was allowed and made several months ago, I see no reason why formal order for this work should not be issued, and accordingly one is being prepared which will be sent to you immediately.

The only work of the nature specified by Item No. 5 of which this office has any record is a claim from you which this office does not consider to be a justifiable one.

Item No. 6 is also automatically taken care of under the provisions of the last subparagraph of paragraph 34 of the specifications to the extent to which payment has been made. No payment in excess of that amount has been authorized.

Items Nos. 7 and 8 I believe have been taken care of by our letters of March 3rd.

15. On April 1, 1930, the contracting officer ordered of plaintiffs in writing certain brass washers at a tendered price of $25. The plaintiffs furnished the brass washers and defendant has not paid for them.

16. The design of the bridge included carved eagles as finials of the two pylons at the Columbia Island end of the

bridge. The blocks of stone therefor are known in this case as the "eagle stones." The Government at first intended to have the plaintiffs set these two blocks after they had been carved, in which event each of them would have been within the maximum of 15 tons set in Article 82 of the specifications. During the progress of the work the defendant's officers decided that the blocks should be set uncarved and thereafter sculptured. In their uncarved condition each weighed about 31 tons, and the contracting officer invited a proposal from the plaintiffs for the change in work. Plaintiffs at first submitted a proposal which included an insurance premium of $600 and profit and cost of bond thereon. At the contracting officer's insistence they eliminated the premium on insurance, the profit, and the cost of bond thereon, and on August 24, 1930, quoted a price of $3,126 for setting the two stones, stating: "In making this revision to our estimate we have deducted the amount covering property insurance premium plus profit, plus bond, which we had originally included." Plaintiffs procured insurance against damage to property and injury to persons in the setting of these stones, and paid therefor a premium of $600.

On September 2, 1930, the contracting officer accepted plaintiffs' proposal in the sum of $3,126 and authorized payment thereof under Article 33 of the specifications, and payment has been limited to that amount, leaving $600 unpaid.

17. Piles were used for supporting false work for the beam spans for the underpasses. The increase in depth below the contract drawing "rock" line necessitated plaintiffs' using longer piles for the east underpass. Plaintiffs had originally planned to use 22-foot piles, based on a bearing surface at the "rock" line. They were forced by the circumstance to use 30-foot piles and were thereby put to an additional expense, excluding overhead, profit, and bond of $618.75. With the three additional factors, the amount is $722.23.

18. Construction of the main arch span could not be begun until both the Virginia and Columbia Island sides of the bridge were ready. During the process of its construction

it was supported on steel I-beams resting on the concrete walls. Plaintiffs used three sets of 14 I-beams each. They had planned originally to use two sets only. The walls were not completed in the order originally expected due to disruption of plaintiffs' program of work. In the original plan one set of I-beams was to be shifted to new locations and new use after one girder had been completed. The cost of the additional set of supports, together with cost of additional form work, supports, and forms for underpasses necessary on account of inability to shift the work, was $4,294.92, exclusive of overhead, profit, and cost of bond. With these three added the cost amounted to $5,013.25.

19. The contract drawings delineated the course of drains for the underpasses. They could not be laid as indicated without passing through the cylinders, which was not a proper method of routing, and plaintiffs bypassed the drains around the cylinders, using extra fittings and pipe to form offsets. The cost of the diversion was $424.21, exclusive of overhead, profit, and cost of bond. Including overhead, profit, and cost of bond, the amount is $495.16.

20. Most of the excavated rock and gravel from the two abutments was placed in the Boundary Channel because there was no other place available for storing it without hauling it away. This material was removed from the channel later on at the insistence of the contracting officer and with the permission of the Government inspectors used for backfill over the abutments. The cost of removing it from the channel was $3,943.05, exclusive of overhead, profit, and cost of bond. Adding overhead, profit, and cost of bond, the amount is $4,602.53.

21. Plaintiffs erected a concrete mixing plant on the job, a part of which were the material hoppers. The base of the material hoppers was of earth, upon which were constructed side walls and a sloping bottom of planks. The earth used in the construction was procured by permission of defendant's resident engineer from excavation of the Virginia abutment cofferdam, he representing at the time that no earth so deposited need be removed or graded. At the insistence of the contracting officer it was graded down by plaintiffs and the grading finished September 26, 1930.

The cost thereof was $349.82, exclusive of overhead, profit, and cost of bond. Including them, the amount is $408.32.

22. Plaintiffs finished the pouring of concrete and the setting of stone August 27, 1930. Except for leveling off the earth from the site of the aggregate hoppers the contract work was finished September 17, 1930. The leveling off of this earth was completed September 26, 1930, as hereinabove related.

By mutual arrangement the question as to extension of contract time, and the number of days' delay, if any, to be charged to the plaintiffs in the form of liquidated damages, was left to be determined at the conclusion of the contract work. A like postponement was agreed to with respect to plaintiffs' calculation of their costs for the purpose of preferring claim they might have against the United States.

On or about August 28, 1931, the contracting officer assessed against the plaintiffs liquidated damages for 111 days' delay, at the contract rate of $100 per day, total $11,100, and against plaintiffs' protest withheld that sum February 8, 1932, from sums otherwise due plaintiffs on the contract. This assessment extended the time for completion from February 2, 1930, the original contract date for completion, to June 7, 1930, or an extension of 125 days.

Had normal progress in the work been sustained without the circumstances complained of plaintiffs would have completed the contract about January 21, 1930. Computed on the normal date for completion of January 21, 1930, and the actual clean-up date, September 26, 1930, there were 248 calendar days of delay.

Plaintiffs' costs were increased on account of the 248 days of delay, by way of increases in union wage scales after the original contract date for completion, rentals, salaries of straight-time foremen, office-force salaries, and extension of work further into the winter, amounting in all to $35,768.87, exclusive of overhead, profit, and cost of bond. Including these factors, the costs amount to $41,751.21.

23. Had plaintiffs finished the contract work January 21, 1930, or thereabouts, the costs to them on the work as originally called for by the contract would have been less than they were under the actual conditions. This increase in cost,

due to conditions actually encountered, different from those under which they could normally have completed the work by January 21, 1930, or thereabouts, amounts to $78,217.84, exclusive of overhead, profit, and cost of bond. With these three added, the increase amounts to $91,299.78.

24. On December 10, 1930, plaintiffs in writing to the executive officer of the Arlington Memorial Bridge Commission, asserted a claim against the United States for a net cost for additional work on the Boundary Channel Bridge, of $162,901.70, concluding with the statement:

> An equitable adjustment would, we believe, be reached by taking the cost of the whole work as the final adjustment. This cost can readily be audited.

The executive officer replied that he was unable to agree to this basis of settlement, and suggested reference of the question of basis to the Comptroller General of the United States. The plaintiffs submitted more detailed calculations of cost and on May 11, 1931, the executive officer submitted the question to the Comptroller General as to whether settlement should be made on basis of Article 4 of the contract, or Article 48 of the specifications.

This question was submitted to the Comptroller General May 11, 1931, by letter as follows, a copy thereof being at the same time transmitted by the contracting officer to the plaintiffs in this case:

> The N. P. Severin Company (general contractor for the Boundary Channel Bridge of the Arlington Memorial Bridge project) has presented a claim in the amount of $162,901.70 to cover alleged additional costs incurred by him as a result of increased depth of the foundations for this bridge made necessary by the existence of a layer of unsuitable material which had to be excavated and replaced with concrete in order to secure satisfactory foundations for that structure. Attached hereto are photostat copies of the correspondence exchanged with the Contractor on this subject.
>
> Following is a brief summary of the conditions and operations appertaining to this claim: At Abutment No. 5 (i. e., the abutment on the Columbia Island side of the Boundary Channel) a layer of gravel and boulders averaging about seven feet in thickness was encountered. The borings which had been made before

the contract was advertised had apparently struck the boulders and this layer of gravel was accordingly indicated on the contract drawings as the top of rock. The minor piers and the foundation cylinders on the Columbia Island side also had to be extended through the same gravel and had to be carried deeper than shown on the contract drawings.

At Abutment 6 (i. e., the abutment on the Virginia side of the Boundary Channel) the rock indicated on the contract drawings was found upon being uncovered, to be decomposed and traversed with layers of soft mud. It was necessary to remove this material to a depth of from 8 to 12 feet before a suitable bearing was found. The minor piers and foundation cylinders on the Virginia shore were also carried down deeper than was originally anticipated because of this same decomposed rock.

The condition at both abutments was of course entirely unsuspected by the Contracting Officer. No such conditions were found at any of the four abutments and six piers of the Main Bridge previously built. However, the possibility of such an eventuality had been foreseen and an effort to provide for it was made in Paragraph 48 of the specifications in conjunction with Article 4 of the contract. The usual test probings were made, and the depth to the top surface of the bedrock or gravel as found in the excavations agreed with that disclosed by the probings.

In the opinion of the engineers of this Commission, the additional work necessitated by the conditions as found was not unusually difficult; in fact, as foundation work goes, it was relatively easy because no sub-surface water was encountered except that from seepage, which was handled by one or two small electrically driven pumps. In the excavation for Abutment No. 5, where the gravel was found, considerable extra sheeting and bracing were necessary, but in no greater amounts than would be required in ordinary foundation excavations of the same depth. In Abutment No. 6, the soft rock was firm enough to stand alone so that little or no additional bracing was necessary.

However, it should be said in favor of the Contractor that the condition encountered was as unsuspected by him as it was by the engineers of this office, and the experience with other nearby foundation work previously done justified the assumption that similar conditions would be found here. He was necessarily

put to considerably greater expense in making the additional excavation and in placing the additional concrete than might have been involved had the conditions been known before the work was started. The necessity for the extra bracing was not known until cofferdams had been built to conform to the conditions indicated by the contract drawings. This fact accounts for the rather large cost of the excavating and bracing work as mentioned below.

In consequence of the increased depth of the foundations, it was necessary to excavate about 3,000 cubic yards of additional material, most of which was either loose or decomposed rock or gravel, and to place approximately 1,700 cubic yards of additional concrete in the foundations. As this work progressed, payments for it were made to the Contractor under the provisions of Paragraph 48 of the specifications. All of the bills submitted by the Contractor for this work were checked by the field forces of this office and payments were made in connection with the usual monthly estimates, except in a few instances where claims were either disallowed entirely or payment postponed pending further study. These postponed claims aggregate approximately $8,000.00.

The Contractor has already received approximately $77,000.00 for the additional foundation work.

On October 23, 1929, after practically all of the foundation work had been completed, the Contractor directed a letter to this Commission claiming changed conditions and settlement for additional costs under Article 4 of the contract, and advising that he would present additional bills for his work. This was answered by a letter dated October 28, 1929, which in turn elicited a letter from the Contractor dated November 14, 1929, after a conference between the officials of this Commission and the Contractor.

No further formal correspondence on the subject took place until after the Boundary Channel Bridge was completed on September 26, 1930. Shortly after that date, the Contractor requested advice as to what procedure he should follow in presenting his claim. He was informed that the Contracting Officer would consider any direct claims for tangible items of work, and was prepared to make payment for such items if substantiated and if the work involved was authorized under the provisions of the specifications or the contract. He was also informed that the Contracting

Officer could not advise him as to how to prepare his claims, and could not decide questions involving claims for intangible items or items involving legal interpretations. During the course of our conversations, I offered to consider the several protested items which had previously been disallowed or postponed, but the Contractor preferred to include all of his claims in the one sum which he obtained by deducting the payments which he previously received from the total cost of the work as computed by his own accounting force.

On December 10, 1930, the Contractor presented a formal letter making claim for a final payment of $187,-901.70, of which $25,000.00 was the amount retained by this office from the monthly estimates, and the balance, $162,901.70 was to cover the additional costs alleged to have arisen from the changed conditions encountered. This letter was followed on December 12th and 22nd with detailed statements of cost from the Contractor, all of which were replied to by my letter dated January 9, 1931.

The matter is further complicated by the consideration of time. The date for completion as originally fixed was February 2, 1930, whereas the work was not actually completed until September 28, 1930. Paragraph 42 of the specifications provides that liquidated damages in the amount of $100.00 per calendar day will be assessed for all delay in completing the work after the date fixed for completion, corrected if necessary, for changes ordered in the work to be done and extra work. Besides the additional foundation work referred to above, the Contractor did other additional work which was found necessary and ordered from time to time in accordance with Paragraphs 31 and 33 of the specifications, with the result that a total of a little more than $105,000.00 has been paid to him as extras for which additional time is allowable under the specifications.

His claim is now submitted to you for your opinion as to whether the conditions described above were such as to justify legally a settlement on the basis of Article 4 of the contract, including excess costs for items and expenses not related directly to the foundation work. Personally, I have been forced to the conclusion that the conditions found were only such as Paragraph 48 of the specifications covered and was intended to cover, and that the obligations of the Government would be fully discharged by settlement in accordance therewith.

However, the Contractor deserves every possible lawful consideration since he in no way skimped the work and finished the contract with unusual perfection, in spite of the knowledge that it was costing him much more than he had anticipated.

The Comptroller General on June 26, 1931, held that the plaintiffs were not entitled to additional payment or adjustment of contract time other than as provided in Article 48 of the specifications.

On August 28, 1931, a voucher prepared by or under the direction of the contracting officer was stated in plaintiffs' favor in the net sum of $13,900, being based (1) on a completion date of September 17, 1930, (2) the contract price of $338,000.00 without adding thereto the several items of cost and expense hereinabove enumerated, and (3) deduction for liquidated damages of $11,100, being 111 days at $100 per day, was eventually signed by the plaintiffs under protest, and payment of $13,900 in due course was made.

25. Plaintiffs have been paid for work adjudged by the contracting officer to be "extra" under the terms of the contract, a total of $105,405.38, being for the following items:

Rock excavation in Virginia abutment, piers and cylinders, and Columbia Island abutment and cylinder No. 40 thereon	$44, 582. 43
Excavation of gravel from Columbia Island abutment	7, 146. 11
Bracing and shoring Columbia Island cofferdam below "rock line"	2, 262. 80
Extra concrete in foundations	19, 922. 40
Extra reinforcing steel	14, 490. 84
Extra bending of steel	586. 22
Excavation for struts	2, 543. 49
Extra class "B" concrete in struts, in fillets of jamb walls, and in fillets back of arches	2, 841. 75
Removal of silt from Columbia Island	5, 307. 62
Placing rocker plates	2, 595. 72
Setting "eagle stones"	3, 126. 00
	105, 405. 38

The extra concrete in foundations, $19,922.40, consisted of 1,660.2 cubic yards, and was paid for at the rate of $12 per cubic yard, as hereinabove related. The extra class

"B" concrete for struts and fillets, $2,841.75, consisted of 113.67 cubic yards, and was paid for at the rate of $25 per cubic yard. Payment of the remainder of the above items included 15% for overhead and profit, which was a reasonable percentage, and 1½% on the aggregate thus determined, which represented the actual cost of bonds.

In addition to the payment of $105,405.38 for so-called "extra" work, plaintiffs have received from the Government on the contract $326,900.00, a total of $432,305.38. The difference between $326,900.00 and the original contract price of $338,000.00 is $11,100.00, which is the deduction for liquidated damages.

The court decided that the plaintiffs were entitled to recover in the sum of $614.72.

OPINION

WHALEY, *Judge*, delivered the opinion of the court:

This suit is brought to recover upon a contract between the plaintiffs, doing business as N. P. Severin Company, and the United States, represented by U. S. Grant, 3d, Executive and Disbursing Officer, Arlington Memorial Bridge Commission, as contracting officer. Plaintiffs agreed to furnish all labor and material and perform all work required for the construction of the Boundary Channel Bridge of the Arlington Memorial Bridge Project, Washington, D. C., in accordance with their accepted bid and specifications, schedules, and drawings which were made a part of the contract, for the consideration of $338,000, together with certain unit prices for possible additional contract work. The work was to commence on or before January 28, 1929, and to be finished on or before February 2, 1930. The work was completed and accepted September 17, 1930.

In the aspect of the case, as it is presented, plaintiffs claim the right to recover cost, overhead, and profit on so much of the work as was due to changed conditions resulting from the actions of defendant in imposing certain obligations upon the plaintiffs which were not set forth in the specifications or the contract.

The two main contentions are (1st) that, after the contract was entered into, the Government pumped filling material on Columbia Island on which the East end of the bridge was to be erected, resulting in a heavy layer of silt being deposited within the neat lines of the site, and also adjoining thereto, which required the plaintiffs to remove the same before work could be commenced, and (2nd) that the rock lines, as shown on the drawings, did not give accurate information as to true conditions, resulting in misleading the plaintiffs, because when the rock, as indicated on the drawings, was reached no bedrock was found but only rotten rock and gravel which necessitated plaintiffs' excavating to a much greater depth, entailing the pouring of large quantities of concrete, delaying the work and retarding other work to the complete disruption of the progress schedule for the completion of the contract. There are other items of extra work and damages sustained, for which plaintiffs sue, but the two claims mentioned above are the ones on which the case is mainly based.

A determination of this controversy requires reference to certain parts of the contract and specifications and the notice to bidders. It should be mentioned at this point that the plaintiffs were contractors who had undertaken large contracts for the erection of private residences, post-offices, and schools but had never before undertaken the construction of a bridge of any considerable size, and were unfamiliar, from inexperience, with contract work in rivers and harbors.

Under the terms of the contract it was provided that the contracting officer might, by written order, change the drawings or specifications within their general scope and the contract prescribed the method of determining the ultimate decrease or increase in prices. It further provided that, if subsurface conditions at the site materially differed from those shown on the drawings or indicated in the specifications, the contracting officer should immediately make the necessary changes in the drawings and specifications and the contract price should be adjusted by methods set forth therein; that no charge for extra work and material would be allowed unless such work was ordered in writing and

allowed by the contracting officer and the price stated in the order; that in case of delay, due solely to the fault of the contractors, liquidated damages were assessable, and the facts and the extent of the delay to be found by the contracting officer were to be final and conclusive on both parties, subject only to appeal to the head of the department.

The specifications were sent to the contractors for the purpose of having their bid made from the requirements thereof.

1. DREDGING ON COLUMBIA ISLAND

Article 10 of the specifications provides:

> *Bidders to visit site.*—Bidders are expected to visit the site of the work and to inform themselves as to all existing conditions, and also to inform themselves as to the progress and schedules of all work which may be under way or contemplated, such as the dredging operations on and around Columbia Island, etc. Failure to do so will in no way relieve the successful bidder from the necessity of furnishing all equipment and materials and performing all work required for the completion of the contract in conformity with the specifications.
>
> No allowance will be made for the failure of a bidder correctly to *estimate the difficulty attending* the execution of the work. [Italics ours.]

There was also provided in Article 26 of Section II of the Specifications the following:

> *Columbia Island and dredging operations.*—Columbia Island has been built up to a height of 16 to 20 feet by dredging from the river channel. The dredging was discontinued during the summer of 1927, but it is likely to be *resumed by the time the work of this contract is started or very shortly thereafter, and will be continued indefinitely until dredging work contemplated upon this project is completed.* The dredging of the water gate at the Washington end of the bridge will also be started before the work of this contract is finished. The schedule of dredging operations can be obtained at the United States Engineer Office, Washington, D. C.
>
> The contractor shall arrange his work so that the dredging may be done without interference from his operations; also he shall protect the dams and levees on Columbia Island against any damage due to the prose-

cution of his work, and shall immediately make good at his own expense any damage which may be so occasioned. [Italics ours.]

Under Article 27 there is the following paragraph:

* * * The contractor shall so conduct his operations as to allow all other construction work on the Arlington Memorial Bridge project, *whether started previously to or after the beginning of the work contemplated herein*, to proceed as easily as practicable, and he shall provide for and allow the joint occupancy and joint use of all Government-owned land and facilities by all other contractors and (or) agencies engaged in such construction work. * * * [Italics ours.]

Prior to making their bid, plaintiffs visited the site of the project, saw that dredging operations had been performed on Columbia Island and that the dredge was then in the river at the site but actual operations had been suspended. Subsequently, after the contract had been signed, dredging operations on Columbia Island were again commenced and there was poured and deposited upon the site and the surrounding land, a heavy layer of silt which it was found by the contractors necessary to be removed before actual operations on the East end of the work could be commenced. Plaintiffs protested to the contracting officer that the removal of this additional fill was outside of the contract, and the contracting officer authorized its removal. The contracting officer gave plaintiffs a written order to remove 3,618 cubic yards of earth at the East end of the bridge on Columbia Island and authorized payment under Article 33 of the Specifications reading as follows:

Extra Work.—The contractor shall perform all extra work not otherwise covered by these specifications which, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract or incidental in any way to the work under the contract, and which is ordered in writing by the contracting officer.

The cost of all extra work carried out under the provisions of this paragraph will be paid for on the basis of the actual cost thereof to the contractor (including the hire or rental of such plant as may be used exclusively for such extra work and including also workmen's compensation insurance, but excluding over-

head), plus fifteen (15) per cent of that cost to cover profit and all indirect charges against such extra work except those specifically mentioned herein to be included.

The time fixed for the completion of the work will be extended for all extra work by the same method as described in paragraph 31 for changes in amount of work to be done.

However, the plaintiff removed not only the quantity specified by the contracting officer, which was the cubic yardage confined to the bridge site, but also additional fill under derricks. Plaintiffs claim in addition the extra cost of removing prior fill, under bridge site and derricks, incurred by reason of its having been saturated by the additional superimposed fill. They also claim the cost and maintenance of plank roads and mats, necessitated by the wet condition of the fill, and the expense of floating equipment, in all, $11,747.65 and, as this was a changed condition, the Government is responsible under Article 4.

The contention of the plaintiffs is that this additional burden was not contemplated by the contract or shown by the specifications and that, in making their bid, plaintiffs had no way of knowing the situation on which to base their estimate, other than as shown by the specifications. However, the specifications distinctly notified plaintiffs that dredging operations would be commenced either before or after the signing of the contract, and that plaintiffs had to make their bid in contemplation of this work which was to be performed. When the contractors visited the site, before making their bid, they knew that dredging operations had been performed on Columbia Island and saw that the dredge was still in position, and they were also informed by the specifications that further dredging operatios were to be performed. With this notification, plaintiffs bid without further inquiry or clarification of the situation. There can be no recovery for the additional amount of material removed for the reason that the specifications distinctly notified plaintiffs of the conditions which arose.

Plaintiffs contend that they were put to additional expense in the removal of the earth beneath the silt because of the fact that the water, which brought the silt on the

site, saturated the ground underneath so that extra expense was incurred in removing it in its saturated condition, and that further extra expense was incurred by reason of the saturated condition of the ground in that plaintiffs were prevented from using land equipment and were forced to procure floating equipment. In our opinion, the contracting officer was liberal in his interpretation of the specifications when he allowed the change order for extra work in the removal of the silt on the site of the work. Article 26 of the Specifications notified the contractors that dredging operations would be resumed by the time the work on plaintiffs' contract was started and would continue indefinitely until the dredging work was completed. Plaintiffs had notice, before and after making their bid and after entering into their contract, of the conditions which subsequently arose, and it was their bounden duty to take the situation into consideration and to protect themselves in their bid and also in the protection of the site either by berm or cofferdam. An experienced contractor, familiar with hydraulic dredging work, with the provision in the specifications (Article 26) before him, would have known that he would have to anticipate, not only silt, but the saturation from the water which brought the silt in. The contracting officer refused to make payment as an extra for this work. We think he was correct in his construction of the contract and, therefore, no recovery can be had for these items.

2. ROCK AND GRAVEL EXCAVATION

The second claim is for expenses of excavating for abutments, cylinders, and piers both on Columbia Island and the Virginia shore below the rock line indicated in the drawings and including concrete in excess of the contract requirement. Article 34 of the Specifications provides:

> *Estimate of quantities.*—The estimated quantities of the major items of the work to be done under this contract are approximately as follows:

Class A concrete	750 cu. yds.
Class B concrete	11, 900 cu. yds.
Granite to be set	55, 835 cu. ft.
Reinforcing steel	466. 3 tons.
Structural steel	300. 4 tons.

Opinion of the Court

The above quantities have been computed with ordinary care and accuracy from the contract drawings, and are believed to be substantially correct, but they are furnished only for the information and convenience of bidders and without responsibility to the United States.

Bidders are expected to compute or otherwise to verify from the contract drawings the actual quantities of materials to be furnished and work to be done, and no claims for adjustment arising from any errors, either relative or absolute, which may be discovered in any of the above quantities will be allowed.

The quantity of concrete to be placed as given above was calculated from the contract drawings on the basis of elevations and dimensions indicated. As stated on the drawings, the elevations shown for bedrock are average only, and departures of about 5 feet either way from those averages may be expected. *If, due to unexpected depths to bedrock*, the aggregate amount of concrete actually placed in the foundations shall exceed the amount as estimated from the contract drawings, the contractor will be paid twelve dollars ($12) per cubic yard for the excess. However, no deductions will be made in case the aggregate of concrete actually placed in the foundations is less than the estimated amount. [Italics ours.]

When the rock line, as indicated on the drawings, was reached on the Columbia Island side, no bedrock was discovered, but there was encountered a bed of gravel and boulders which was unsuitable for foundations. Plaintiffs were ordered to continue digging. When about 7 feet had been further excavated, decomposed rock was uncovered. This was ordered to be dug into until at about 2½ feet deeper plaintiffs were ordered to clean the rock and pour concrete, without having reached bedrock. On the Virginia side when the rock line, as indicated on the drawings, was reached, it was found that this rock was not bedrock but decomposed rock and it was necessary to excavate to an average of 9½ feet below the point indicated on the drawings where rock was supposed to be reached. The specifications allowed a variation of 5 feet either way. Bedrock was not found, but, after the depth above indicated had been reached, the contracting officer determined that a suf-

ficient bearing surface could be had by pouring concrete into the excavation. This unexpected depth was plainly anticipated in paragraph 4 of Article 34 which provided:

> If, due to unexpected depths to bedrock, the aggregate amount of concrete actually placed in the foundations shall exceed the amount as estimated from the contract drawings, the contractor will be paid twelve dollars ($12) per cubic yard for the excess.

Plaintiffs claim that, due to this condition, they were put to heavy additional expenses, prolonged delays were occasioned, and their whole schedule of progress was thrown out of line. However, the plaintiffs did not furnish schedules of progress either before or after commencing work, as were required by the contract and repeatedly requested by the defendant. The contention is made that this condition amounted to "changed conditions" which fell under Article 4 of the contract and not under Article 34 of the Specifications. Article 34 plainly covered a situation that might otherwise be embraced in other provisions of the contract relating to changed conditions. The conditions which arose were specifically provided for as "unexpected" under Article 34 of the Specifications. The depths to bedrock were unexpected and compensation was likewise specifically provided for in such a contingency.

The contracting officer (Findings 9 and 25) determined the amount of extra concrete to be paid for and allowed plaintiffs $19,922.40 at the rate provided for under Article 34 of the Specifications. The yardage which had been paid for as an extra was to be the difference between that actually poured and that provided in the contract drawings. This was in the contracting officer's province to determine, and, having determined it, and paid for it, no more is allowable.

The expense of excavating below the rock line of the drawings was incurred in order to get down to bedrock. As Article 34 of the Specifications plainly provided for the contingency of unexpected depths, and the bidders, on reading that Article, were made aware of the contingency, nothing can be recovered to make up for the lack of foresight in calculating the bid so as to include the contingency

of unexpected depths. There can be no recovery for extra excavation beyond that allowed by the contracting officer. This disposes both of the direct and indirect expenses for rock and gravel excavations and prevents recovery of all items set forth in Findings 7, 8, and 9.

Plaintiffs were allowed $53,991.34 for the rock and gravel excavations for abutments, piers, cylinders, and incidental bracing and shoring. (Finding 25.) This allowed the contractors basic cost plus 15% thereof to cover overhead and profit and 1½% on the aggregate for cost of bond. This was in strict compliance with Article 48. Plaintiffs contend that they should receive payment under Article 4, which provides for "changed conditions," and that an equitable adjustment should be made, in which event, they would be entitled to the difference between what it cost the plaintiffs and the contract price. The cost to the plaintiffs was not necessarily an equitable adjustment. There might be charges included excessive in their nature and uncalled for in their character. The contracting officer computed the amount of cost from the daily reports on labor and material furnished by the plaintiffs and made the adjustments in accordance with Article 48. Plaintiffs received compensation for rock excavation in the Virginia abutment, piers, and cylinders. They also received payment for the excavation of the gravel and the bracing and shoring on the Columbia Island cofferdam below rock line and also for extra concrete foundations, in all, the sum of seventy-odd thousand dollars. Thus, having reached this conclusion with respect to the Government's liability for excess excavation, the item for extra pile lengths is eliminated. (Finding 17.)

3. EAST END WALL

The contract drawings showed a wall to be erected at the East end, known as the East End Wall, which was designed to support the deck of the bridge and not as a retaining wall. The drawings showed back filling on one side of the wall only, whereas there should have been filling on both sides. The plaintiff followed explicitly the drawings, plans, and specifications, and back filled on one side of the wall only.

As a result of this back filling on one side, the wall bulged and cracked and the bottom moved out of line some seven inches and the top some ten inches. To an experienced engineer, the error in the drawings would have been apparent and it was the duty of the contractors, with such a glaring error in the drawings, to notify the contracting officer before proceeding with the work. The attention of the defendant was not called to the situation until after the wall had moved out of line and then the plaintiffs were called upon and required to move the wall back in place. The extra expense to the plaintiffs was $5,060.67 and a claim is made for this additional expense.

Article 7 of the Specifications provides that the contractor will not be allowed to take advantage of any errors or omissions in the specifications or in the contract drawings as full instructions will always be given if such errors or omissions are discovered. It was the duty of the contractors, under this article of the specifications, to have called the attention of the contracting officer to this error or omission in the drawings before the work of back filling was commenced. If this had been done, a correction could have been made, or, if not made, the Government would have been liable for the damage. The damage resulted because of the failure of the contractors to carry out Article 7 of the Specifications. It was such a glaring error in engineering construction that the contracting officer was entitled to have his attention called to it by the contractors. There can be no recovery on this item.

4. STONES

Certain of the stones furnished by the Government were not fully cut and finished and ready for setting. Plaintiffs provided this work at a cost of $80.41 and make claim for reimbursement. Under the provisions of the Specifications, Article 89 (quoted in Finding No. 2), the Government was to furnish stones provided, *generally*, with proper holes before delivery to the contractors, all others to be cut at the contractors' expense. Certain of the stones were lacking the proper holes. This omission it was the obligation of the contractors to supply at their own expense, which they did. There can be no recovery on this item.

The Government furnished a piece of bullnose granite which, after having been set, was rejected by the Government for defectiveness. The plaintiffs were required by the contracting officer to remove this granite and to place in its stead another piece. This was the fault of the Government in furnishing a defective piece of granite and entailed additional work on the part of the plaintiffs. The Government ordered the work performed and has received the benefit of it. The cost to the plaintiffs was $94.56 and this amount they are entitled to recover.

5. FIRE PROTECTION

During the course of the work, a fire broke out and destroyed property belonging to the plaintiffs and delayed the work. After the fire the contracting officer required the plaintiffs to provide adequate fire protection. The plaintiffs furnished certain fire apparatus and now make claim for reimbursement. Under Article 10 of the contract it is provided:

> The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, *and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.*

Under this provision it was the duty of the contractors to provide proper fire protection and therefore no recovery can be had on this item.

6. BRASS WASHERS

It is conceded that the plaintiffs are entitled to recover for the cost of brass washers furnished by them in the amount of $25.00.

7. INSURANCE ON EAGLE STONES

Under the contract provisions the Government was to furnish carved Eagles as finials of the two pylons at the

Columbia Island end of the bridge. However, the Government determined to have the stones erected on the Columbia Island abutments and then to have the Eagles carved after they had been put in place. This was a change in the contract and the plaintiffs were asked to make a bid for the erection of these heavier stones. The first bid made by the plaintiffs included an item of $600.00 for insurance and the contracting officer refused to accept it. Plaintiffs then made a second bid with the item of $600.00 for insurance eliminated. The contracting officer accepted this bid and the plaintiffs performed the work. The plaintiffs, of their own volition, took out insurance on the erection of these stones and paid $600 premium. A claim is now made for this expense. The Government accepted the bid without the insurance item and refused the one with the insurance included therein and the plaintiffs knew when the second bid was made and accepted that the Government would not pay for the insurance. This was a contract and no further sum can be recovered.

8. EXTRA BEAM SET

The plaintiffs used three sets of steel I-beams instead of two, as originally planned by them and now make claim for the cost of this extra set due to the disruption of their program of work. The plaintiffs never furnished a progress schedule of work although the contracting officer demanded it on several occasions. We have held that the progress of work was not impeded by the defendant and therefore the cost of the extra set of I-beams used by the plaintiffs is not recoverable, under Article 44 of the Specifications.

9. BYPASS OF DRAINS

The contract drawings delineated the course of drains for underpasses. The plaintiffs found it was impossible to lay the drains as shown on the drawings without passing through the cylinders which was an improper method of routing. The plaintiffs bypassed the drains around the cylinders at an extra cost of $495.16. The work was per-

formed and the change was allowed by the Government and accepted by it, and plaintiffs are entitled to recover on this item.

10. REMOVING ROCK AND GRAVEL FROM CHANNEL; CLEANING UP HOPPER PLANT

During the course of the excavation work, the plaintiffs dumped rock and gravel in the channel instead of hauling it away or using it in other parts of the work. Under Article 40 the plaintiffs were required to remove surplus material, rubbish, etc., and leave the premises at the end of the contract in a neat, clean, and orderly condition. The plaintiffs, however, dumped the rock excavation and the gravel into the channel. Subsequently, they removed it and now make a claim for the extra cost. Under Article 47 of the Specifications it is provided:

> None of the excavated material shall be wasted in the Boundary Channel.

The extra cost which was incurred was due to plaintiffs' own act in violating the explicit directions of the contract.

Plaintiffs also claim the expense of cleaning up the site of their hopper plant. Under Article 40 this also was manifestly to be borne by the plaintiffs.

There can be no recovery on these items.

11. LIQUIDATED DAMAGES AND DAMAGES TO PLAINTIFF FOR DELAYS

Under the terms of the contract the completion date was February 2, 1930. The contract was not completed and accepted until September 17, 1930, a period of 227 days. Under Article 9 of the contract liquidated damages were provided for and under paragraph 5 of Article 31 of the Specifications it is provided:

> The time fixed for the completion of the work will be extended for increases in the amount of work to be done, or shortened for decreases, by the number of days which bears the same proportion to the number of days fixed for the completion of the work as the

Opinion of the Court

aggregate change in cost as computed by the provisions of this paragraph bears to the contract price: *Provided, however*, That in those cases when, in the judgment of the contracting officer, the application of this rule would be manifestly unfair either to the United States or to the contractor, the contracting officer may waive the rule and adjust the time involved in such cases by negotiation and agreement with the contractor.

Under this provision the contracting officer computed the amount of extra work performed and the cost thereof, as number of days of delay, taking into consideration the it compared with the contract price, allowed the plaintiffs 116 additional days and assessed liquidated damages for 111 days at $100 per day. The contracting officer exercised his judgment in fixing this amount. We have carefully recomputed the number of days allowable and we agree with the contracting officer that the contractors were allowed all that they were entitled to under the contract. There can be no recovery on this item.

The increased amount allowed by the Court over that allowed by the contracting officer for extra work performed does not increase the number of days allowable under this provision of the contract.

What we have said, with respect to the absence of Governmental responsibility for the delays complained of, disposes of the plaintiffs' two general claims for damages resulting therefrom, that is to say, $41,751.21 and $91,299.78, set forth in Findings Nos. 22 and 23, and no recovery can be had upon them.

Judgment will be entered for the plaintiffs in the sum of $614.72. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

LOS ANGELES & SALT LAKE RAILROAD COMPANY v. THE UNITED STATES

[No. 42568. Decided December 6, 1937]

On the Proofs

Income and profits taxes; time of reporting additions to income.—Where railroad received in 1919 award of additional railway mail pay for carrying the mails in 1916 and 1917, for which payment was made in 1920, this addition to income is held to be properly assessable in year in which amount due the plaintiff was definitely settled, and time when notice of decision was served upon taxpayer is immaterial. *New York Central Railroad Co.* v. *Commissioner of Internal Revenue*, 79 Fed. (2d) 247. (Certiorari *denied.*)

Same.—Where books are kept on accrual basis, return should be made for the year in which income is definitely determined; the Commissioner, however, having discretion to determine the method of accounting which most clearly reflects the net income. *Lucas* v. *American Code Co.*, 280 U. S. 445, 449.

Same; exchange of properties.—Where there is an exchange of properties, with no increase in income and no increase in value of assets, there is no taxable gain.

The Reporter's statement of the case:

Mr. Harry J. Gerrity for the plaintiff. *Mr. Henry W. Clark* was on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court, pursuant to the stipulation of the parties, made special findings of fact as follows:

1. The plaintiff is and was at all times herein mentioned a corporation organized under the laws of the State of Utah, engaged in the business of a common carrier, and subject to the jurisdiction of the Interstate Commerce Commission.

2. No action has been had on the claim sued upon in this case, either in Congress or before any department of the Government, except as stated in these findings. Plaintiff is the sole owner of the claim sued upon and has never made any assignment or transfer thereof or of any interest therein.

Reporter's Statement of the Case

3. Plaintiff has at all times kept its accounts on the accrual basis, and in accordance with the accounting classifications of the Interstate Commerce Commission, and all of plaintiff's income and profits tax returns have been made upon such accrual basis.

4. Plaintiff duly filed with the Collector of Internal Revenue at Los Angeles, California, a consolidated income and profits tax return for the calendar year 1919, under the Revenue Act of 1918 (40 Stat. 1057), for itself and its affiliated corporation, Las Vegas Land and Water Company. Said tax return disclosed a tax due thereon of $92,011.20, which plaintiff paid to the Collector in quarterly installments during 1920, the final payment amounting to $23,002.81 being made on December 10, 1920. The entire consolidated tax liability for 1919 was allocated to plaintiff by agreement between it and the Las Vegas Land and Water Company.

5. On March 31, 1921, plaintiff filed a claim for the refunding of $30,383.79 of the tax paid for 1919 as aforesaid, and on June 30, 1925, it filed a further claim for the refunding of an additional amount of $12,934.45 of the tax paid as aforesaid for the year 1919. These refund claims stated specifically and definitely the several deductions from income claimed as the basis thereof.

6. Thereafter the income and profits tax liability of plaintiff and its aforesaid affiliated company for 1919, and at the same time also their tax liabilities for the years 1918 and 1920, were examined by a field auditor at the principal accounting office of plaintiff then at Los Angeles, California, and following his report the tax liabilities for said years, together with the claims for refund filed as aforesaid, were audited and re-audited by the Commissioner of Internal Revenue, and in the course of such audit and re-audit the Commissioner of Internal Revenue issued to plaintiff four Audit Letters, tentatively and subject to protest and hearing, as follows:

(1) Letter dated February 6, 1926, covering the years 1918, 1919, and 1920, and finding for 1919 a deficiency of $11,787.05.

(2) Letter dated October 9, 1926, covering the years 1918, 1919, and 1920, and finding an overpayment for 1919 of $18,327.94.

(3) Letter dated August 13, 1930, covering the years 1918 and 1919, and finding an overpayment for 1919 of $19,590.62.

(4) Letter dated December 23, 1931 (hereinafter called the "Final Audit Letter"), covering the years 1918 and 1919 and finding for 1919 a deficiency of $1,854.93, the collection of which, however, was further found to be barred by the statute of limitations, and notifying the plaintiff that it was proposed to reject its aforesaid refund claims for the reason that the tax liability for 1919 was found to be in excess of the amount previously assessed.

7. Plaintiff waived the privilege of further hearing extended by the Final Audit Letter and thereafter, on March 12, 1932, the Commissioner of Internal Revenue disallowed and rejected the plaintiff's claims for refund on Schedule No. 19,567.

8. Waivers were from time to time executed by plaintiff and the Commissioner which extended the time for additional assessments of the taxes for 1918, 1919, and 1920 until December 31, 1926, and no further extensions were agreed upon.

9. In and by the Final Audit Letter the Commissioner of Internal Revenue allowed plaintiff certain deductions from gross income for 1919 in addition to deductions made by the plaintiff in its consolidated return for that year, amounting to $409,326.39, including deductions amounting to $402,067.76 which had been specified in plaintiff's aforesaid refund claims and which had also been allowed by each of the preceding Audit Letters. But in the Final Audit Letter the Commissioner of Internal Revenue offset against the additional deductions so allowed for 1919 certain items of alleged additions to income for that year aggregating $431,719.80, making an excess of offsetting additions over said allowed deductions of $22,393.41.

10. There is no controversy in respect to the additional deductions allowed by the Final Audit Letter as aforesaid or in respect to the offsetting additions to income made by

the Commissioner except that plaintiff challenges the following items of said offsetting additions to income:

Additional railway mail pay	$73,255.65
Adjustments growing out of contract with Utah Copper Company:	
(a)	127,317.84
(b)	46,125.00
Total offsets challenged	246,698.49

11. The item of $73,255.65 included among the additions to income made by the Final Audit Letter was additional compensation for carrying the United States mails for the period from June 30, 1916, to December 31, 1917, realized by plaintiff under and pursuant to Decision 9200 of the Interstate Commerce Commission (Railway Mail Pay, 56 I. C. C. 1).

12. The decision aforesaid was rendered in an investigation made pursuant to Section 5 of the Act of Congress approved July 28, 1916 (37 Stat. 412, 425), and fixed and determined the rates of compensation for transporting the United States mails to be paid to railroads. This decision by the Interstate Commerce Commission was dated December 23, 1919, but it was not made available to the public or served on the interested carriers, including the plaintiff, until January 15, 1920.

13. Thereafter the Post Office Department computed the compensation payable to plaintiff pursuant to the aforesaid decision of the Interstate Commerce Commission, and determined that the additional amount of $73,255.65 was due to plaintiff, which was paid to plaintiff during the year 1920.

14. The additional railway mail pay aforesaid was not entered or accrued in plaintiff's books of account for any year prior to 1920, but it was credited to its revenue accounts in the year 1920 and was reported as taxable income in its consolidated income and profits tax return for that year.

15. The Commissioner of Internal Revenue in the Audit Letter dated February 6, 1926, eliminated the additional railway mail pay from 1920 income and added it to taxable

income for 1919. The subsequent Audit Letters including the Final Audit Letter continued this treatment.

16. The items of $127,317.84 and $46,125.00 included among the additions to income by the Final Audit Letter, mentioned in Finding 9, grew out of a contract entered into on the 24th day of October 1917, by and between plaintiff and Utah Copper Company (hereinafter called the "Copper Co."). A copy of this contract is attached to the stipulation of the parties marked Exhibit "A" and made a part of the record by the court.

17. In 1916 the main line of plaintiff's railroad immediately adjoined for a distance of some three miles the tailings dumps of the Copper Co. near Garfield, Utah. The Copper Co. urgently needed to extend its tailings dumps, which then reached the south line of plaintiff's right-of-way, to land lying north of plaintiff's right-of-way, and requested that plaintiff agree to the relocation of its railroad, at the expense of the Copper Co., on a new route varying from a half mile to a mile in distance north of its then existing location adjoining the said tailings dumps. Such relocation required also the relocation of the railroad for some distance both east and west of the tailings dumps and in all the relocation and construction of more than nine miles of railroad. By said contract plaintiff agreed to the relocation of its railroad.

18. The change in trackage provided for by the contract was completed and the new trackage turned over to the plaintiff for operation on May 28, 1918.

19. Plaintiff did not at any time until after December 23, 1931, assert that the aforesaid relocation of its trackage was completed in 1918 or claim that the items growing out of the relocation should be allocated to 1918 if held to be taxable income.

20. In 1919 plaintiff credited its property investment accounts with the sum of $196,564.27 as the cost of that part of its line of railroad which had been abandoned, charged to its property investment accounts the sum of $323,882.11 as the cost incurred by the Copper Co. in the construction of the new and relocated section of railroad, and credited to its profit and loss account "606—Donations," the sum of

$127,317.84, being the difference between the above mentioned amounts credited and debited, respectively.

21. Deeds for the new right-of-way for the relocated section of railroad were delivered by the Copper Co. to plaintiff in 1918, except three parcels of such right-of-way. The right-of-way over one of the three excepted parcels was obtained by condemnation which was decreed by the court in 1920. The right-of-way over the two remaining excepted parcels, which belonged to the Western Pacific Railroad Company and the Garfield Improvement Company, was obtained by deeds delivered to plaintiff by the Copper Co. in 1921 and 1922, respectively. Plaintiff conveyed its abandoned right-of-way for the old line of railroad to the Copper Co. in 1920.

22. In the Audit Letter dated February 6, 1926, the Commissioner of Internal Revenue included as an addition to income the aforesaid sum of $127,317.84 credited to profit and loss for 1919, holding, in accordance with the then practice of his office, that so-called donations to railroads were taxable income. Plaintiff filed its protest objecting to this adjustment. The Audit Letter dated October 9, 1926, excluded the Copper Co. item of $127,317.84 from additions to taxable income. This item continued to be omitted from taxable income in the Audit Letter dated August 13, 1930. In the Final Audit Letter, however, the Commissioner of Internal Revenue included the item as an addition to taxable income, holding that "it is tantamount to a gain on an exchange of one roadbed for another which is taxable under the provisions of Section 202 (b) of the Revenue Act of 1918." This item is included in the aggregate of $431,719.80 of additions to income made by the Final Audit Letter as stated in Finding 9.

23. In the negotiation of terms prior to the execution of the contract dated October 24, 1917, plaintiff contended (a) that, because the new line was about a half mile longer than the old and included curvature which the old line did not have, an increased cost of operation would be incurred permanently, which it estimated at $2,306.25 per year, and that this should be provided for by a payment by the Copper Co. of $46,125.00, being the amount of said annual increased

cost of operation capitalized at 5 per cent; and (b) that, because of the boggy nature of the country much expense had been incurred in refilling the roadbed and reballasting the track of the old line to obtain a proper solidification, that a similar expense would be incurred in maintaining the new line during the first few years of its use, and that this should be provided for by a payment by the Copper Co. of $19,760.00, being the estimated amount of such expense of maintenance, at the rate of $2,000 per mile of the relocated section of railroad. The Copper Co. assented to the foregoing contentions and Section 7 of the contract is the expression of the agreement thereon. The amount of $65,885.00 named in said section is the sum of the two items aforesaid of $46,125.00 and $19,760.00.

24. Shortly after the conveyance in 1920 by plaintiff to the Copper Co. of its abandoned right-of-way it billed the Copper Co. for the aforesaid sum of $65,885.00 provided for by Section 7 of the contract and payment thereof was made by the Copper Co. in 1921. This payment was accounted for by plaintiff as a credit in the year 1921 to its account "Miscellaneous Credits," and in a later year was transferred from said account to its account "606—Donations."

25. Plaintiff did not at any time invest or deposit the amount of $46,125 as a special fund or set it up in its books of account as a reserve or other special account appropriated or to be held for any particular purpose, but that amount was mingled with plaintiff's general funds and treated as available for any corporate purposes.

26. The aforesaid report of the Field Auditor set back the amount of $65,885.00, which he found credited in plaintiff's accounts for 1921 and included the same as an addition to taxable income for 1919. The amount was treated in like manner in the Audit Letter dated February 6, 1926. In plaintiff's protest to the Audit Letter it conceded that the item of $19,760.00 included in the amount of $65,885.00 was a proper addition to taxable income but contended that the item of $46,125.00 being the balance of said amount, constituted a capital contribution and a non-taxable "donation."

The Audit Letter dated October 9, 1926, also included the whole of the amount of $65,885.00 as an addition to income. But the Audit Letter dated August 13, 1930, reversed this treatment as to the item of $46,125.00 and held the same to be a non-taxable "donation", on the authority of the decision of the Board of Tax Appeals in the case of the *Great Northern Railway Co.*, 8 B. T. A. 225, 271. The Final Audit Letter again restored the item of $46,125.00 to the additions to taxable income for 1919 with the following explanation:

> It is shown by the provisions of the contract between the parties that the amount of $46,125 was paid to the taxpayer as compensation. This item has been included in taxable income, inasmuch as amounts received in the nature of compensation have been held to constitute taxable income. (Reference: Section 233 of the Revenue Act of 1918; Articles 541 and 31–33 of Regulations 45, case of *Kansas City Southern Railway Company;* decision of the United States Board of Tax Appeals, Volume 22, page 949; also case of *Noel* v. *Parrott*, 15 Federal (2d) 669.)

The item of $46,125.00 is included in the additions to taxable income aggregating $431,719.80 made by the Final Audit Letter as stated in Finding 9.

Upon the foregoing special findings of fact, which are made part of the judgment, the court decided that the plaintiff was entitled to recover the sum of $12,020.50, with interest at the rate of six per cent per annum from December 10, 1920, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code.

Green, *Judge*, delivered the opinion of the court:

This is a suit upon two claims of refund for the recovery of Federal income and profits taxes alleged by the plaintiff to have been overpaid.

It appears that a controversy arose as to the proper amount of plaintiff's taxes for the calendar year 1919. It is not necessary to set out here the details of the proceedings in relation to these taxes as the parties are in agreement that the only matters now in dispute relate to certain addi-

tions to the income of plaintiff made by the Commissioner in his final audit of the taxes for the year in controversy. The sole issue in the case is whether these items were properly assessed as income. The items of increase to income so included are as follows:

Additional railway mail pay for carrying the mails in 1916 and 1917, awarded in 1919, and paid to plaintiff in 1920	$73, 255. 65
Adjustments growing out of contract with Utah Copper Company in relocation of a portion of plaintiff's main line track:	
(a)	127, 317. 84
(b)	46, 125. 00
Total	246, 698. 49

With reference to the railway mail pay item, it appears that the services were rendered in 1916 and 1917 but that there was a controversy over the rate of pay and litigation to determine it was pending before the Interstate Commerce Commission so that the amount due the plaintiff could not be determined until this matter was decided. The Interstate Commerce Commission determined the rate of compensation in 1919 but the plaintiff did not receive payment until 1920. The plaintiff contends that either the time of the performance of the work, or the time when the pay was actually received, must be taken as the period for assessment and in this connection calls attention to the fact that the decision of the Interstate Commerce Commission was not made available to the public, or served on the interested carriers including the plaintiff, until 1920.

In our opinion, the time when notice of the decision was served upon the plaintiff is immaterial, and the Commissioner might properly take the time when the amount of pay due the plaintiff was definitely settled as the year for the assessment on the income so derived.

During the period involved in the case there was much litigation between the railroads and the Government with reference to the amount of railway mail pay. In many cases after the amount had been determined, the question further arose as to when the pay for each year accrued. The decisions of the courts have been at variance on this point.

The Board of Tax Appeals first held that the amount to be paid accrued when the services were performed. Later it reversed this holding and the decisions of other tribunals can not be harmonized. Upon the whole, we think that the opinion and decision of the Circuit Court of Appeals for the Second Circuit in the case of *New York Cent. R. Co.* v. *Commissioner of Internal Revenue*, 79 Fed. (2d) 247 (certiorari denied), furnishes the most satisfactory solution for the problem presented. The facts in the case were precisely similar to the facts in the case at bar and, although the court did not necessarily have to pass on the question now before us, much that is said in the opinion is, we think, applicable. In that case the Commissioner of Internal Revenue contended that the railway mail pay accrued for tax purposes in the year 1920 while the railroad company contended it should be regarded as income at least not later than the year 1919. The court held against the Commissioner and after reviewing all of the early decisions of the Board of Tax Appeals on the question said:

> At least as early as December 23, 1919, all the facts existed which determined the amount of the Government's liability, and all these facts were known to the taxpayer prior to the time of preparing its income tax return for that year. See *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290, 298, 52 S. Ct. 529, 76 L. Ed. 1111. Since the taxpayer reported on the accrual basis, we can see no justification for deferring accrual of the income beyond the year when the precise amount thereof could have been included in the tax return.

The court's final conclusion was that the income should have been included in the return for the year 1919 when the amount was definitely fixed.

It may be argued that the case of *Continental Tie & Lumber Co.* v. *United States*, *supra*, does not support the decision of the Circuit Court of Appeals but in the case decided by that court and the case now before us the facts differed from those in the *Continental Tie case* in an important feature, namely, that the taxpayer had not seen fit to accrue on its books or report the income involved as

having been a part of its income for the year in which it was earned. In both the *Continental Tie case*, and the case at bar the matter was treated as unsettled and as one in which the income was to be reported at a later date when its amount was definitely ascertained.

It will be observed that if the plaintiff had returned the income involved in the year when it was earned it could only make an estimate of its amount and when it was definitely determined it would be necessary to file an amended return. In fact the correct assessment upon this railway mail income could not be made until the amount was definitely ascertained and more time would elapse before the tax was assessed so that the statute of limitations would have run in many cases. It may be that a tentative return should be made in such cases and a tentative assessment made, but this leaves the whole matter in uncertainty and in any event is a very cumbersome method of procedure. A far better rule, in our opinion, where the books of the taxpayer are kept on an accrual basis, is to make the return for the year in which the income was definitely determined and the amount which would accrue ascertained.

In *Lucas* v. *American Code Co.*, 280 U. S. 445, 449, it was said:

> The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test. And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the act.

It will be noted that the requirement that the net income be computed according to the method of accounting regularly employed by the taxpayer is limited to cases where the Commissioner *believes* the accounts clearly reflect the net income and that consequently much latitude for discretion was given, and it was further held by the court that the "interpretation of the statute and the practice adopted" by the Revenue Bureau "should not be interfered with un-

less clearly unlawful." Applying practical tests to the situation in the case at bar, we find (first) that the rule now contended for by plaintiff is difficult to apply and cumbersome in practice; (second) that it is quite plain that the Commissioner did not believe it would *clearly reflect* the income of the taxpayer to return the railway mail income as taxable for the year in which it was earned in some indefinite amount. Following the decision in the *Lucas case*, *supra*, we think the Commissioner's act in assessing the railway mail pay as income for 1919, the year for which the amount was definitely decided, was not "clearly unlawful."

The items of $127,317.84 and $46,125.00 included among the additions to income for 1919 by the final audit letter, as before stated grew out of a contract between the plaintiff and the Utah Copper Company. There is no dispute with reference to the terms of the contract, a copy of which is attached to the stipulation of facts agreed to by the parties and made a part of the record. It provided for an exchange of properties, the abandonment of several miles of plaintiff's track and its relocation, with several minor agreements to which reference will hereinafter be made.

It appears that the Copper Company needed additional land and the location of plaintiff's line prevented its acquisition in a useful way. To accommodate the former, the railway company agreed to relocate its line on land furnished by the Copper Company which was to pay all the expenses of the relocation.

The defendant claims there was an exchange of properties but the plaintiff alleges there was merely a donation and contends that even if there was an exchange the tax was not assessed for the proper year. To this the defendant replies that the plaintiff is estopped from claiming the tax was not assessed for the proper period. We are clear that there was an exchange of properties but unless there was some gain or profit resulting to plaintiff from the exchange no tax could properly be assessed thereon. In our opinion, the contract should be considered as a whole and the question of gain or profit must depend upon the condition of plaintiff after all of the provisions of the contract had been

performed as compared to its situation before the contract had been entered into. When this is done, we find that when the contract had been fully performed in all its particulars the plaintiff had given up a portion of its line with all appurtenances including the right-of-way, and had received instead a new line with right-of-way and all necessary appurtenances. The new line was longer and cost much more than the old line, the extra cost according to plaintiff's books being $127,317.84, but it was of no more use to the railway company than the old line and would not produce a cent more income. Nor was the value of plaintiff's assets as a whole increased by a single dollar. The fact that the plaintiff had entered in its investment account the sum last above stated (subsequently transferred to "donations") does not alter the situation. There was no proper basis for this charge to the investment account and we can not perceive how the plaintiff made any profit out of any part of the transaction or received any benefit.

The statement above needs a slight qualification, but it is too slight in our opinion to make any difference in the final judgment.

Under the contract, the Copper Company was to construct the new line but the railway company was to pay for the rails, joints, and tie plates, etc., used in its construction except as required for the excess in mileage of the new construction over the old. In the construction of the new line, the Copper Company must have used new ties which were worth somewhat more to plaintiff than the old ties and the railway company may have benefited in some slight degree by some of the other minor agreements with reference to highways, buildings, and appurtenances, the amount of which can not in any event be determined or even estimated from anything in the evidence. These matters we think are not sufficient to justify an assessment in any amount. Our conclusion is that the assessment of $127,317.84 upon gain or profits in the exchange of properties is erroneous. There is likewise no basis for the assessment of $46,125.00 in connection with the transaction. The Copper Company agreed to pay this amount in consideration that the new line was longer, its upkeep and opera-

Syllabus

tion would cost more, and in particular because the nature of the soil upon which it was constructed was boggy. Like the other minor agreements of the contract, the purpose of this provision was simply to make the plaintiff whole in the transaction and to insure it against loss and so far as shown by the evidence this is all that was accomplished by this provision and the contract as a whole. The parties agreed upon a sum to be paid at once which they estimated would reimburse the plaintiff for additional expense incurred in operating the new line, and when this was paid the plaintiff derived no profit or gain. We find that the Commissioner erred in assessing the item of $46,125.00.

What we have said above makes it unnecessary to determine the other points discussed by respective counsel. The total amount erroneously assessed against plaintiff is $173,442.84. The parties have stipulated as to the manner of computing the amount of plaintiff's recovery should the court determine that it is entitled to recover in the case. Following this stipulation, we find the amount of plaintiff's recovery to be $12,020.50. Judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WHARTON GREEN & CO., INC., A CORPORATION EXISTING UNDER THE LAWS OF THE STATE OF NEW YORK v. THE UNITED STATES

[No. 42894. Decided December 6, 1937. Certiorari denied by the Supreme Court April 4, 1938]

On the Proofs

Government contract; liquidated damages; delay caused by Government.—Where there is no proof that actual damages have been sustained, and where party claiming damages is equally at fault, and amount of delay caused by either party cannot be ascertained with reasonable accuracy, liquidated damages will not be allowed. *U. S.* v. *United Engineering & Contracting Company*, 234 U. S. 236, 242; *Wyant* v. *U. S.*, 46 C. Cls. 205; *Monks et al., Exrs.* v. *U. S.*, 79 C. Cls. 302, 338.

Same; decision of contracting officer.—Where delays by Government have made completion of contract impossible by date specified, provisions of contract fixing a time limit for completion are abrogated and there is nothing as to which decision of contracting officer can apply.

The Reporter's statement of the case:

Mr. Philip S. McNally for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation of the State of New York, with its principal office in New York City.

2. On September 12, 1929, plaintiff entered into a contract with the United States, represented by its contracting officer, the Secretary of State, whereby plaintiff agreed, for the consideration of $835,617.00 to "furnish all labor and materials, and perform all work required for the construction of a group of buildings and landscaping, consisting of (1)—buildings; Ambassador's residence, Chancery Building, two apartment houses, A and B; (2)—landscaping; swimming pool, reflecting pool, garages A, B, and C, roads, walks, steps, boundary and retaining walls, gates and gate houses, tool houses, fences, finished grading and planting, water supply, drainage system and lighting," in Tokyo, Japan, in accordance with specifications, schedules and drawings made a part thereof, the work to be commenced on or before October 9, 1929, and be completed on or before February 1, 1931.

Copy of the contract and specifications is attached to the petition and made part hereof by reference.

The contract made the findings of the contracting officer, as to the facts and extent of any delay, final upon the parties thereto.

3. Plaintiff commenced the work of clearing and excavating the site October 25, 1929.

The architects were H. Van Buren Magonigle and Antonin Raymond, and they had general supervision and direction of the work in behalf of the United States. The architects wrote the specifications.

Raymond was authorized to represent the contracting officer on the job up to February 17, 1930, but was reluctant to and did not exercise full authority in that respect. On February 17, 1930, Captain T. D. Stamps, an Army engineer, arrived in Tokyo and upon arrival represented the contracting officer on the job and there exercised authority as contracting officer.

The respective jurisdictions of Raymond and Stamps on and after February 17, 1930, were not clearly or precisely defined, but in general the architect, Raymond, interested himself in architectural matters, and Stamps, the engineer, in the forwarding of construction.

The construction work at the site was sublet by plaintiff to a Japanese firm by the name of Ohbayashi Gumi.

Ohbayashi Gumi acted as representative of the plaintiff on the job as to the physical work of construction, and plaintiff also had a representative there by the name of Thomas Green, who acted in an executive capacity for plaintiff, primarily in respect to financial matters.

Plaintiff had a representative in the United States, Wharton Green, who kept in contact with the architect, Magonigle, in New York City. Magonigle made the architect's drawings for the project from time to time during the course of the work.

4. After the contract had been entered into, the municipal authorities in Tokyo disapproved of the reinforcing steel plans for the embassy buildings, on the ground that they were not adequate to meet earthquake conditions. The Government thereupon ordered the plaintiff to use more reinforcing steel than required by the contract. The increase amounted to 218.9165 tons and was installed. Obtaining the additional steel which had to be fabricated and shipped from the United States caused considerable delay, the amount of which is not definitely shown by the evidence.

There is no evidence of any order from the contracting officer in writing stating a price for the extra steel. The contracting officer's representative, Capt. Stamps, fixed upon $69 a ton as a fair price to the plaintiff, and plaintiff has been paid for the extra 218.9165 tons $15,105.24 at that

rate. There is no proof that the allowance made was unfair or unreasonable.

5. Capt. Stamps ordered the installation of individual vent pipes for lavatories, bathtubs, and sinks except where near a stack. The additional vent pipes so ordered were not required by the contract. There is no evidence of an order in writing from the contracting officer for the additional vent pipes stating a price therefor. Capt. Stamps fixed upon $500 as a proper allowance for the extra work and that amount has been paid the plaintiff. There is no proof that the allowance made is unfair or unreasonable.

6. Shortly after Capt. Stamps arrived on the job concrete was poured for the basement walls and first floor of the ambassador's residence and of one of the apartment houses. When the forms were taken off it was discovered that the concrete was honeycombed, that is to say, voids were scattered through it, making it structurally unsatisfactory. Plaintiff's representatives requested that they be permitted to use a greater proportion of water in the concrete mixture than specified in the contract, on the ground that the change in mixture would eliminate voids. Capt. Stamps allowed plaintiff to use more water but at the same time in writing required more cement to maintain strength in the concrete that would otherwise have been lost by the addition of water.

The presence of voids in the original mixture was due to inexpert methods used by the subcontractor in puddling the concrete. The use of extra reinforcing steel required greater care and skill in getting the mixture into interstices, and Capt. Stamps permitted the change in mixture to get good results under these circumstances.

Mixed and puddled expertly both the proportions of water, cement, and aggregate required by the contract and those actually used on the job gave the minimum strength allowed by the contract.

In changing the mixture plaintiff used an additional 318 barrels of cement. There is no proof of a fair and reasonable price therefor, or of any price stated in a written order from the contracting officer.

7. In the drawings for the heating system the architects omitted necessary access holes for steam valves and traps. Capt. Stamps in writing required them to be made, and metal boxes and covers therefor to be furnished and installed. There is no evidence of a written order therefor with price stated in the order.

The extra work was done and material furnished as required. There is no satisfactory evidence of the number of access holes, boxes, and covers therefor, or of the fair and reasonable price thereof.

8. The invitation for bids and the specifications included as part of the work the construction of squash courts, and plaintiff had included them accordingly in its bid price. The contract later entered into left out the squash courts, and the consideration named in the contract was less than the bid price, the reduction being due to the elimination of the squash courts from the project as originally planned.

The site where the squash courts were to have been built was below grade. In the process of excavating for building foundations a part of the excavated material was placed by plaintiff on this site to bring it up to grade, the remainder was hauled away. The contracting officer or his representative gave no specific order, verbally or in writing, for the filling in of this site.

The fair and reasonable worth of the service rendered in bringing the squash-court area up to grade is not proven.

9. The principal cause of delay in the completion of the work was the failure of the architect to furnish drawings when needed.

The detailed drawings in connection with the work were done in New York City by the architect for the Government and the work could not proceed until these drawings were furnished by the architect.

If the buildings contracted to be built for the Government were to be completed by the contractor at the time specified in the contract, namely, February 1, 1931, all of the detailed drawings would have been needed by August 15, 1930. Some of the drawings required material which had to be fabricated in the United States and then shipped to Tokyo, a proceeding which usually required about six months.

Thirty-two shipments of material were not made until after February 1, 1931.

One hundred and fourteen detailed drawings were delivered after August 15, 1930; ten drawings were received in August 1930; ten in September 1930; twenty-five in October 1930; twenty in November 1930; eighteen in December 1930; six in January 1931; two in February 1931; twenty-one drawings in March 1931; five in April 1931; two in June 1931; and two in July 1931. Thirty-two of these drawings were delivered after the date set for completion.

Among other things that caused delay was the fact that it was not until November 1931, that the Government finally determined not to install the mural drawings as called for by the contract and ordered the contractor to paint the ambassador's residence. Delay was also caused by unusual weather conditions, structural revisions, and additional work ordered.

The buildings were accepted by the United States as completed November 20, 1931. This was 292 days more time for the work than provided by the contract.

The contracting officer held and determined that 194.5 days of this excess time was chargeable under the contract to the plaintiff as liquidated damages of $100 per day, or $19,450, and this amount has been withheld from plaintiff from the amount otherwise due on the contract price. The remainder, 97.5 days, the contracting officer held and determined to be the number of days' delay not due to the fault of the plaintiff, assigning these days to:

	Days
Unusual weather conditions	5
Structural revision	14
Additional work ordered	18.5
Delayed drawings	60
	97.5

And plaintiff has not been charged with the period of 97.5 days so assigned.

The amount of delay attributable to each of the parties can not be definitely determined from the evidence. The contracting officer used a formula in making his decision thereon but his conclusion was quite erroneous as far more

of the delay was caused by the failure of defendant to perform its duties under the contract than could properly be attributed to plaintiff, and it is quite evident that the delays caused by defendant were such that it was impossible for plaintiff to complete the contract within the time specified, or within the time allowed by the contracting officer.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover $25,722.48 alleged to be due under a contract with the defendant and for work performed and not paid for. It appears that the plaintiff entered into a contract with the defendant for the construction of an embassy building in Tokyo, Japan, in accordance with specifications, schedules, and drawings, the work to be commenced on or before October 9, 1929, and completed on or before February 1, 1931, for a consideration of $835,617. The plaintiff entered upon the work and completed it but not within the time specified in the contract. In making payment for the contract work the defendant deducted $19,450 as liquidated damages under the contract for an alleged delay in its completion of 194.5 days.

The plaintiff also makes a claim that the defendant did not allow a fair and reasonable sum for work performed and material furnished beyond that required by the contract. It is not necessary to set out the items of this part of plaintiff's cause of action as none of the items of this claim are established by the evidence.

As to the liquidated damages deducted from the contract price by defendant, the plaintiff claims that they were wrongfully and illegally withheld. The defense is that the buildings were not completed until 292 days after the time fixed by the contract and the matter of delay was submitted to the contracting officer, who determined that 194.5 days of this excess time were chargeable under the contract to the plaintiff as liquidated damages at $100 per day, or $19,450, and that plaintiff was paid for the remainder of the time.

The contract provided in substance that the work should be done in accordance with certain plans and specifications

and also in the manner set out in drawings to be furnished by the Government. The bid of plaintiff was upon the plans and specifications tendered by the Government, and there was an implied warranty of their sufficiency. *United States* v. *Spearin*, 248 U. S. 132. As the work also had to be done in accordance with drawings to be furnished, we think there was an implied warranty or agreement that the drawings would be furnished in time to complete the contract at the specified date, although this conclusion is not necessary in order to support our decision herein. The specifications for structural steel were insufficient and new steel had to be ordered, causing delay. A special cause of the delay was the failure of the defendant to furnish detailed drawings in time to enable the plaintiff to complete the work within the time limit of the contract. A number of them were not furnished until after the contract date set for completion and some not until nearly six months after the expiration of the time limit. See Finding 9. Although there was some delay on the part of plaintiff, failure to furnish these drawings on time was the principal cause of the delay considered as an entirety. It is impossible to determine from the evidence just how much was caused by the plaintiff and how much by the defendant, but it is evident that far more delay was caused by the defendant than by plaintiff. Under these circumstances, no deduction for liquidated damages can be allowed. In *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236, 242, it is said:

> We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract can not be insisted upon, and liquidated damages measured thereby are waived.

A long line of cases is cited by counsel for plaintiff in support of the rule laid down above, among which we may

call attention to *Wyant* v. *United States*, 46 C. Cls. 205, wherein it is said:

> The authorities are harmonious in holding that the failure of one party to a contract to perform conditions upon which depend the execution of the contract by the other waives the stipulation as to time limit * * *.

It is the general rule that liquidated damages in the absence of any proof that actual damages have been sustained (which was the situation in the case at bar) are not favored by the courts and will not be allowed where the party claiming them is equally at fault, and the amount of delay caused by either can not be ascertained with reasonable accuracy. In the recent case of *Monks et al., Exrs.* v. *United States*, 79 C. Cls. 302, 338, it is said:

> Where delays in the completion of the contract are caused by both parties to the contract, and the period for completing the work has thereby been extended beyond the time originally fixed, the obligation to pay liquidated damages is annulled and cannot be revived, and any recovery for delays must be based on the actual loss sustained. [Citing numerous authorities.]

It is urged on behalf of defendant that the matter of delays was passed on by the contracting officer and that his decision in the absence of fraud or such gross negligence as would show lack of good faith is conclusive against the plaintiff under the terms of the contract.

In determining the amount of delay the contracting officer used certain formulae and the evidence fails to show definitely the amount of delay which may be ascribed to each of the parties. Under all of the circumstances, we are unable to find that this officer showed such gross negligence in his findings that bad faith must be imputed to him. We have, however, found that his conclusions were quite erroneous in that far more of the delay was attributable to the defendant than to the plaintiff, while he decided that twice as much was attributable to plaintiff as to defendant. We have also found that the delays caused by the defendant made it impossible for the contract to be completed at the time which was specified, or even within the time allowed by the contracting officer. In this connection it should be noted that

some of the drawings, without which the work could not be carried on, were not furnished until months after the date fixed for completion and after they had been furnished, material had to be obtained from the United States.

Under such circumstances, all of the authorities hold that liquidated damages should not be imposed. In some of the decisions it is said that the provision with reference to time limit was waived; in some that it has been annulled; and in others it has simply been held that it can not be enforced. Also, in some of the cases it was said that where the defendant had delayed the plaintiff beyond the date prescribed by the contract the court has no fixed date from which the contract could be enforced or liquidated damages computed. In all of the cases the effect of the rules laid down is to abrogate the provisions of the contract fixing a time limit for the completion of the work. When we make use of the rules laid down in the decisions cited, it is evident that there is no time limit remaining in the contract between plaintiff and defendant and consequently there is nothing as to which the conclusions of the contracting officer can apply. In other words, there being no time limit, the conclusions of the contracting officer with reference to the matter of delays are entirely immaterial.

The plaintiff is entitled to recover the amount withheld by defendant as liquidated damages and judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

McNEILL-ALLMAN CONSTRUCTION CO., INCORPORATED, W. E. McNEILL, LEE ALLMAN, AND JOHN ALLMAN, v. THE UNITED STATES

[No. 42940. Decided December 6, 1937]

On the Proofs

Corporation income tax; gross income improperly computed by field agent; deductions presumed to be correct.—Where corporation failed to make income tax return and a return was

subsequently made up by field agent, it was improper to include as gross income contract value of work performed instead of amount of cash actually received on contract; deductions taken in return prepared by field agent, after investigation, presumed to be correct.

The Reporter's statement of the case:

Mr. Robert H. McNeill for the plaintiffs. *Messrs. Grant Bauguess*, *George H. McNeill*, and *Kelly Kash* were on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. On March 8, 1921, W. E. McNeill and Lee Allman, two of the plaintiffs herein, under the name of McNeill & Allman Construction Company, entered into a contract with the Board of Good Roads Commissioners of Ashe County, North Carolina, whereby they agreed, at unit prices, to make certain road improvements for that county.

2. By agreement between W. E. McNeill and Lee Allman of May 17, 1921, the McNeill-Allman Construction Company, another of the plaintiffs herein, was incorporated under the laws of North Carolina on that date for the purpose of carrying out the terms of this contract. Its stockholders were W. E. McNeill, Lee Allman, and the fourth plaintiff herein, John Allman.

The corporation proceeded with the work, but before its completion was, on June 10, 1922, voluntarily dissolved. For the work performed by it the corporation received certain compensation, hereinafter set forth. It did no other business than that directly or incidentally related to this contract.

3. At the end of May 1922 the corporation had performed work of a contract value of $80,143.70, exclusive of extra work thereunder, of which the percentages to be retained before final completion amounted to $12,021.56, making the net amount immediately payable $68,122.14. The Board of Good Roads Commissioners actually paid to the corpora-

tion, up to the end of May 1922, only $69,701.49, under the contract, inclusive of compensation for extra work.

The corporate book or books of account have been lost or destroyed and can not be found. The extent of its expenses is not satisfactorily proved. The corporation operated a commissary, but the evidence does not show the disbursements and receipts therefrom.

4. The corporation having made no return to the collector of internal revenue of its income for the period of its existence, a field agent of his office investigated, and in a conference of W. E. Johnson, cashier of plaintiffs' bank, W. E. McNeill, and the field agent, a return was prepared November 10, 1922, in the name of the corporation, signed by its officers, covering the period begun June 6, 1921, and ended May 31, 1922, and was filed with the collector November 14, 1922.

As gross income there was used in the return an amount of $80,000, being approximately the contract value of the work, as set forth in finding 3 herein, whereas the actual gross income was only $69,701.49. The balance of tax indicated as due was $3,456, to which the collector added 25 per cent for failure to file, $864, and $10 as tax penalty and offer in compromise, making a total of $4,330, which was paid November 24, 1922. If it had shown a gross income of $69,701.49 instead of $80,000, the return, computed accordingly, without other alteration, would have indicated no tax due.

5. After the dissolution of the McNeill-Allman Construction Company, W. E. McNeill became the dissolution agent. He assumed the contract upon dissolution and completed the work through subcontractors in the latter part of 1922 or early in 1923.

6. For the calendar year 1922 the dissolution agent filed an individual income tax return and paid the tax indicated thereon of $89.23. For the calendar year 1923, he filed a like return indicating a tax of $93.02, which was paid.

These returns included in gross income the percentages retained by the Board of Good Roads Commissioners from the plaintiff corporation. The returns were made out with the assistance of the local collector of internal revenue.

The corporation kept its books on a cash basis.

The court decided that the plaintiffs were entitled to recover the sum of $4,330.00, with interest at the rate of six per cent per annum from November 24, 1922, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177, of the Judicial Code.

Green, *Judge*, delivered the opinion of the court:

This action is for the recovery of $4,330 and interest as a refund of taxes paid by the McNeill-Allman Construction Company for the fiscal year ending May 31, 1922. In June 1934 an act of Congress was approved giving this court jurisdiction to determine whether any refund was legally or equitably due the plaintiffs without regard to the statute of limitations.

The findings show that in 1921 the McNeill-Allman Construction Company, a corporation, undertook to perform a contract with the Board of Good Roads Commissioners of Ashe County, North Carolina, to make certain road improvements for that county. The corporation proceeded with the work but before its completion and on June 10, 1922, was voluntarily dissolved. At the end of May 1922, the corporation had performed work of a contract value of $80,143.70, exclusive of extra work thereunder, of which the percentages to be retained under the contract before final completion amounted to $12,021.56, making the net amount then payable $68,122.14. The Board of Good Roads Commissioners actually paid the corporation up to the end of May 1922, $69,701.49 under the contract, including compensation for extra work. The corporation having made no return to the collector of internal revenue of its income for the period of its existence, a field agent of his office investigated the matter, and in a conference of W. E. Johnson, cashier of plaintiffs' bank, W. E. McNeill, and the field agent, a return was prepared November 10, 1922, in the name of the corporation, signed by its officers, covering the period begun June 6, 1921, and ended May 31, 1922, and was filed with the collector November 14, 1922. In making out the return, the Government agent used $80,000 as the amount of gross income, which was approximately the contract value of the work. The actual gross income, however, was only $69,-

701.49. Had this amount been used instead of $80,000, the return computed accordingly without any other changes would have shown there was no tax due. The plaintiffs therefore claim there should be refunded to them the amount of tax and penalties collected, being $4,330. The defendant, on the other hand, contends that the burden of proof is upon the plaintiffs to show the correct amount of tax due, including proof of every item in the return, and as this was not done plaintiffs' action must fail.

We have often held in refund cases that the burden of proof is upon the taxpayer to show that the Commissioner erred in making the assessment of taxes against him, but our decisions have been made under facts quite different from those which appear in the case now before us. None of the plaintiffs made out the return which was executed after a government field agent had made investigation of the matter and prepared the return for signature. It is quite evident that the return was erroneous in that it included the retained percentage of the contract price which was not received during the year of the return in controversy but was afterwards paid to the dissolution agent, included by him in income tax returns for 1922 and 1923, and the tax thereon paid for the second time. The return in controversy being erroneous it is equally evident that the assessment made by the Commissioner in accordance with it, is erroneous. It is argued on behalf of defendant that the amount of deductions made by the corporation in its return is not satisfactorily proved and especially that there is no testimony to show whether a commissary which was operated by the corporation returned a profit.

The reason for the lack of detail in the evidence is probably because the corporation's books have been lost or destroyed in the long period that has intervened.

We do not think under these circumstances that the ordinary rule applies. Rather it seems to us that if there was any presumption it would be that after the government agent had made an investigation and himself made out the return the presumption would be that such matters as deductions were properly taken into consideration and in a general way correctly included in the report. Or, if the

general presumption may be said to obtain, it only requires slight evidence to overcome this presumption which we think is found in the fact that the agent made an investigation and as a result of the investigation prepared the return.

Having reached this conclusion, it follows that plaintiffs are entitled to recover $4,330 with interest as provided by law from November 24, 1922.

Judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

HARRISON H. BOYCE v. THE UNITED STATES

[No. 42954. Decided December 6, 1937. Plaintiff's motion for new trial overruled March 7, 1938]

On the Proofs

Income tax; power of Special Advisory Committee.—Where file relating to claims for refund of taxes for years 1920, 1921, and 1922 were considered by Special Advisory Committee in connection with case referred to the Committee by the Commissioner, involving claim for refund of taxes paid for 1923, this does not constitute reopening and reconsideration of the claims for refund for 1920, 1921, and 1922, without special authority. *Connor* v. *United States*, 82 C. Cls. 476; *Savannah Banking & Trust Company*, v. *United States*, 75 C. Cls. 245.

Same; sufficient notice of closing.—Letter from Chairman of Special Advisory Committee was sufficient notice of rejection. *William E. Jones* v. *U. S.*, 78 C. Cls. 549; *J. E. Ervine & Co.*, v. *U. S.*, 81 C. Cls. 534.

The Reporter's statement of the case:

Mr. William R. Green, Jr., for the plaintiff. *Satterlee & Green* were on the briefs.

Mr. George W. Billings, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court, upon the stipulation of facts and the evidence, made special findings of fact as follows:

1. For the year 1920 plaintiff duly filed his income tax return showing his net income on which tax was to be computed as $153,144.77, and a tax due in the amount of $63,086.69, which amount was duly paid in 1921 in quarterly installments starting March 15, 1921.

2. For the year 1921 plaintiff duly filed his income tax return showing his net income on which tax was to be computed as $152,411.11, and a tax due in the amount of $62,673.39, which amount was duly paid in 1922 in quarterly installments.

3. For the year 1922 plaintiff duly filed his income tax return showing his net income on which tax was to be computed as $119,700.29, and a tax due in the amount of $41,012.17, which amount was duly paid in quarterly installments in 1923.

4. For each of the years 1920, 1921, and 1922, plaintiff filed on March 15, 1926, timely claims for refund in the amounts of $14,243.46, $8,639.69, and $4,392.18, respectively, with interest as provided by law, based on the ground that plaintiff had failed to take on his returns for each of the three years allowable deductions for exhaustion or depreciation on a royalty contract, under which plaintiff was entitled to receive certain royalties on the earnings derived from a device invented by the plaintiff.

5. Plaintiff was duly notified by the Commissioner of Internal Revenue on December 19, 1927, that his claims for refund would be rejected on the ground that depreciation was not allowable on the royalty contract, inasmuch as the value of the contract as of March 1, 1913, depended upon two patent applications made prior to March 1, 1913, neither of which was granted until subsequent to the basic date, and patent applications were not depreciable. The claims for refund were scheduled for rejection on March 19, 1928. No notice of rejection was sent to the plaintiff, as the practice of sending official notices of rejection began on September 7, 1928.

6. The plaintiff is the inventor of a device known as the "Boyce MotoMeter." Application for patents thereon was filed on October 17, 1912. Letters Patent covering the device were issued to the plaintiff on March 17, 1914, and on

August 13, 1918. The principal patent under which the device was manufactured was the one issued in August 1918 and the patents expired on March 17, 1931, and August 13, 1935. On September 12, 1912, plaintiff granted to one Townsend an exclusive and assignable license to make, use, and sell such device upon the payment to the plaintiff of an annual royalty equal to 10% of the net sales price of each device sold.

7. During the years 1920 and 1921 plaintiff was the sole owner of all rights to receive royalties under the contract made with Townsend. On January 6, 1922, plaintiff assigned one-third of his right to receive royalties to his wife, Nancy H. Boyce, and a like one-third interest to his father, William H. Boyce, retaining for himself the remaining one-third interest which he continued to hold through the calendar year 1923.

8. In December 1927 the Commissioner of Internal Revenue asserted a deficiency in income taxes against plaintiff for the year 1923 in the amount of $21,508.40. From this determination plaintiff appealed to the United States Board of Tax Appeals, the proceeding being handled before the Board under Docket No. 34882, and the grounds asserted in the petition to the Board as the basis for the errors charged in the deficiency were, in part, the same as the grounds asserted in the claims for refund for the years 1920, 1921, and 1922.

9. Plaintiff was represented by the firm of Davis, Polk, Wardwell, Gardiner, and Reed in all matters relating to taxation, and one M. N. Fisher associated with said firm, was in active charge of the handling of the claims for refund and the proceeding before the Board.

10. The proceeding before the Board was, by action of the Commissioner of Internal Revenue, referred to the Special Advisory Committee in the Bureau of Internal Revenue on or about November 24, 1928, and Mr. Fisher commenced negotiations with the Committee for a settlement of this proceeding. The files of the Bureau of Internal Revenue relating to the claims for refund here involved were sent to the Special Advisory Committee not later than January 8, 1929, and the proceeding before the Board and the claims

for refund were thereafter the subject of numerous conferences between Mr. Fisher and one or more members of the Committee or their associates. Mr. Fisher presented his facts and contentions concurrently as to both the claims for refund and the proceeding before the Board.

11. On April 3, 1930, a tentative agreement having been reached on the principal question involved in both the proceeding before the Board and the claims for refund, Mr. Fisher, on behalf of the taxpayer, submitted a written proposal dated April 3, 1930, for the settlement of the proceeding before the Board and the claims for refund for all three years. Such written proposal was captioned:

Re: Harrison H. Boyce
Docket No. 34882.

The opening paragraph of the letter reads as follows:

> As indicated at the conference this morning between Mr. Eddingfield, Mr. Griggs, and myself, I submit the following proposal for the settlement of the pending appeal of Harrison H. Boyce for the year 1923 and for the disposition of his claims for refund for the years 1920, 1921, 1922, and 1923.

12. This written proposal dated April 3, 1930, was rejected by Committee letter dated January 12, 1931, reading in full as follows:

> SA:FTE
> CCG
>
> JAN. 12, 1931.
>
> MR. M. N. FISHER,
> % *Davis, Polk, Wardwell, Gardiner & Reed,*
> *15 Broad Street, New York, N. Y.*
>
> In re: Harrison H. Boyce,
> New York, N. Y.
> Docket #34882—Year 1923
>
> SIR: Reference is made to the proposal for settlement of the above-named petitioner's case filed in this office April 3, 1930, and to the alternative proposal filed April 15, 1930, the latter proposal to be considered in the event that the first was found not acceptable by the Committee.
>
> In this connection you are advised that consideration of your proposals has been accorded by the full Committee and the conclusion has been reached that, your proposals for settlement cannot be approved, therefore, the case should be defended before the Board. The

record, therefore, will be returned to the General Counsel for the Bureau for that purpose.

Inasmuch as the case is calendared for hearing on March 25, 1931, and it will require at least ten days by this office to prepare the proper transmittal memorandum to the office of the General Counsel, another conference will be arranged during this period if you desire, for the purpose of settling the case in accordance with the Committee's decision that no deduction may be allowed as exhaustion of the contract or depreciation of patents.

If no conference is requested within the stated period, it will be assumed that you prefer prosecuting the case before the Board, and the record will be returned to the General Counsel as aforesaid.

In future correspondence, reference should be made to the symbols SA:FTE:CCG.

Respectfully,

(Signed) JOSEPH K. MOYER,
Chairman, Special Advisory Committee.

13. Negotiations for settlement of the Appeal case and the Claims for Refund continued intermittently until April 30, 1931. Prior to this date and on the basis of the settlement tentatively agreed upon as to the Appeal, there were computations made in the Audit Section of the Committee of the amounts of correct tax liability for the years 1920, 1921, and 1922 covered by the claims for refund.

14. On April 30, 1931, Mr. Fisher was succeeded by other counsel who settled the proceeding before the Board for the year 1923 upon the basis of the law and facts previously agreed upon. In this settlement of the Board case for 1923 it was stipulated and agreed between the parties thereto that the fair market value of the plaintiff's royalty contract on March 1, 1913, was $950,000; that depreciation or exhaustion should be allowed thereon in the amount of $43,181.82 per year, based upon the period of 22 years from 1913 to 1935, the latter being the year of expiration of the principal patent on the device above referred to; that in the year 1923 (the plaintiff then having only one-third interest in the royalty contract), he was entitled to a deduction for the depreciation of such royalty contract in the amount of $7,216.69, and the final order of the Board of Tax Appeals was duly entered on the basis of that stipulation.

15. Thereafter on October 5, 1931, one Edward H. Cohn, then counsel for plaintiff, wrote to the chairman of the Special Advisory Committee making inquiry as to the official disposition of the deficiencies and claims pending before the Bureau of Internal Revenue for the years 1920, 1921, and 1922. This letter was in full as follows:

OCTOBER, 5, 1931.

JOSEPH K. MOYER, ESQ.,
Chairman, Special Advisory Committee,
Washington, D. C.

Re: *Harrison H. Boyce—1920, 1921, 1922.*

DEAR SIR: All matters pending before the Bureau of Internal Revenue and before the United States Board of Tax Appeals involving Harrison H. Boyce, Harrison H. Boyce, Inc., and Leander Development Corporation have been disposed of and, for the purposes of closing our files, we would like to have a letter showing official disposition of the deficiencies and claims pending before the Bureau in the case of Harrison H. Boyce for the years 1920, 1921, and 1922.

Thanking you and assuring you of my cooperation at all times, I am,

Respectfully yours,

(Signed) EDWARD H. COHN.

EHC*HS

16. On October 9, 1931, Joseph K. Moyer, then chairman of the Special Advisory Committee in the Bureau of Internal Revenue, wrote to counsel for plaintiff in reply to the letter of October 5, 1931, and stated it had been ascertained that the claims for refund for the years 1920, 1921, and 1922 were barred by the statute of limitations and had been so considered by the Special Advisory Committee. This letter of October 9, 1931, was in full as follows:

SA:FTE
CCG

OCTOBER 9, 1931.

MR. EDWARD H. COHN,
1328 Broadway, New York, New York.

In re: HARRISON H. BOYCE,
Claims for refund—1920,
1921 and 1922.

Receipt is acknowledged of your letter, dated October 5, 1931, requesting information relative to the "official disposition of the deficiencies and claims pending before

the Bureau" in the above-mentioned taxpayer's case for the years 1920, 1921, and 1922.

In reply, you are advised that no deficiencies have been before the Committee for consideration in respect to the years 1920, 1921, and 1922. However, when the claims were considered by the Committee it was ascertained that the statutory period within which a refund could be made in any of said years had expired, therefore, since the claims were outlawed, they were returned to the Income Tax Unit with a memorandum from the Committee to this effect.

Respectfully,

(Signed) JOSEPH K. MOYER,
Chairman, Special Advisory Committee.

17. It was stipulated and agreed between the parties hereto that the royalty contract above referred to had a depreciable value as of March 1, 1913, of $950,000. If this Court should find that the claims for refund for the years 1920, 1921, and 1922 have not been finally rejected and that this suit based thereon is not barred by the statute of limitations, then plaintiff is entitled to refunds of taxes in each of the years 1920, 1921, and 1922. The amounts of such refunds are to be computed upon the difference between the taxes paid on the net income shown on plaintiff's returns and the taxes properly due upon the correct net income for each year. The amount of such correct net income shall be obtained by deducting from the net income shown on such returns a deduction for depreciation or exhaustion of the royalty contract for the year 1920 in the amount of $43,181.82, for the year 1921 in the amount of $43,181.82, and for the year 1922 in the amount of $14,393.94.

18. Plaintiff instituted suit on March 27, 1935.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This suit is for the recovery of an alleged overpayment of income taxes for the calendar years 1920, 1921, and 1922. Recovery is sought on the ground that certain claims for refund were reopened and reconsidered and were not thereafter finally rejected by the Commissioner of Internal Reve-

nue and, therefore, the suit is seasonable, and is not barred by the statute of limitations.

From the facts which have been stipulated, it appears that plaintiff duly filed his income tax returns for the three years in question and paid the taxes due thereon. Subsequently, plaintiff filed timely claims for refund for each year on the ground that he had failed to take on his return allowable deductions for exhaustion or depreciation on a royalty contract upon a manufactured device invented by him. On December 19, 1927, the Commissioner of Internal Revenue duly notified plaintiff that his claims would be rejected on the ground that depreciation was not allowable on the royalty contract, inasmuch as the value of the contract as of March 1, 1913, depended upon two patent applications filed prior thereto and that such applications were not depreciable. The refund claims were scheduled for rejection on March 19, 1928. That these claims were duly rejected by the Commissioner is not disputed.

In December 1927 a deficiency was asserted against the plaintiff for the year 1923 from which an appeal was taken to the Board of Tax Appeals and the errors assigned therein were in part the same as the grounds alleged in the claims for refund for the three previous years. The proceeding before the Board was referred by the Commissioner of Internal Revenue to the Special Advisory Committee in the Bureau of Internal Revenue on November 24, 1928, and the attorney for the plaintiff commenced negotiations before the Special Advisory Committee for a settlement of this proceeding. During these negotiations, it appears that the claims for refund, above referred to, were obtained from the files of the Bureau of Internal Revenue by the Special Advisory Committee and the deficiency for 1923 and the claims for refund for the three previous years were the subject of conferences between the members of that Committee and the attorney for the plaintiff. Subsequently, counsel for plaintiff made two written proposals to the Special Advisory Committee for a settlement, first upon the case pending before the Board of Tax Appeals and, in the alternative, second upon the claims for refund and also the deficiency before the Board. Both of these proposals were rejected by the Special

Opinion of the Court

Advisory Committee. During the course of these negotiations and consideration of the two proposals for settlement made by the plaintiff, the Special Advisory Committee had a computation made of the correct tax liability for the three years covered by the refund claims. Following these negotiations and the rejection of the two proposals above mentioned, the case before the Board was settled by stipulation and the refund claims were returned to the files of the Bureau by the Special Advisory Committee with the memorandum that the claims were outlawed. On October 5, 1931, counsel for the plaintiff wrote to the Chairman of the Special Advisory Committee requesting a letter "showing official disposition of the deficiencies and claims pending before the Bureau in the case of Harrison H. Boyce for the years 1920, 1921, and 1922." On October 9, 1931, the Chairman wrote in reply to this letter that when the claims were considered by the Special Advisory Committee it was ascertained that the statutory period for refunds had expired and the claims were outlawed.

The first question with which we are confronted is whether the action of the Special Advisory Committee in considering the files of the Bureau containing the refund claims, while it had under consideration the deficiency for 1923, constituted a reopening and reconsideration of these claims and the bar of statute of limitations for bringing suit was removed. There is no question that the claims were rejected by the Commissioner and that the time has expired in which to bring suit on them unless they were reopened and reconsidered by the Commissioner. What constitutes reopening and reconsideration, or the final act which constitutes a determination from which the two-year period to bring suit begins to run, depends upon the peculiar facts in each case. *Connor* v. *United States*, 82 C. Cls. 476; and *Savannah Banking & Trust Company*, 75 C. Cls. 245.

The facts of this case are stipulated and show that the Special Advisory Committee was created for the purpose of assisting the Commissioner in disposing of the cases pending before the Board of Tax Appeals and that the Commissioner could delegate to the Special Advisory Committee special authority in connection with special cases. Under its gen-

eral powers, the matter of handling the deficiency which was then pending before the Board of Tax Appeals was included, and the stipulated facts show that the Commissioner referred this matter to the Special Advisory Committee. The facts do not show that the claims for refund which had been rejected by the Commissioner were referred by him to the Special Advisory Committee and there is no general power delegated to the Special Advisory Committee which gives it the right to consider refund claims which have not been so specifically sent to it by the Commissioner. Doubtless, the Commissioner could have referred these claims to the Special Advisory Committee while it was considering the case before the Board but the record does not show that he did so. It does show, however, that he expressly referred the case before the Board. Without any express delegation to the Special Advisory Committee on these refund claims, the Special Advisory Committee was without power to reopen them. Under the general powers given to it the Special Advisory Committee could only consider, and recommend to the Commissioner for final action, any matters which had been referred to it. In the settlement of the claim before the Board, the Special Advisory Committee agreed on a settlement and recommended the settlement to the Commissioner and it was the action of the Commissioner, in approving the settlement, upon which the case was finally disposed of before the Board of Tax Appeals. Although this Special Advisory Committee may have considered the refund claims for the purpose of arriving at a settlement of the case before the Board, and, in order to arrive at the amount justly due as a deficiency for 1923, it may have been necessary to compute the depreciation for the previous years, nevertheless, the Special Advisory Committee did not recommend to the Commissioner that these claims for refund be reopened and reconsidered and the Commissioner took no action in reference to them after his first rejection in 1928. The record shows that, far from a recommendation to the Commissioner for a reopening and reconsideration, the Special Advisory Committee simply returned the papers to the files of the Bureau with a notation that they were barred by lapse of time. No recom-

mendation by the Special Advisory Committee was made to the Commissioner and he gave no approval to any consideration of them by the Special Advisory Committee. The papers were not even returned to the Commissioner. It is apparent that the Special Advisory Committee had no authority to reopen and reconsider these claims either express or implied. In the case of *Connor* v. *United States*, *supra*, this court said:

> This special advisory committee had no authority to make final or direct settlements with the taxpayers in cases before it without the approval of the Commissioner.

In our opinion, there was no reopening or reconsideration by the Commissioner on these claims and he did not delegate the power to reopen or reconsider them to the Special Advisory Committee.

Having arrived at this conclusion, the case is finally disposed of. However, the point is made that, even if these cases were reopened and reconsidered, the letter from the Chairman of the Special Advisory Committee on October 9, 1931, to the attorney for the plaintiff was notice of rejection and, suit not having been brought within two years after this rejection, plaintiff is barred under Section 3226 of the Revised Statutes. The plaintiff contends that only the Commissioner is empowered to act on refund claims and, therefore, notice from the Special Advisory Committee would be a futile act. We do not think this is true. If the Special Advisory Committee had the power to reopen and reconsider the refund claims on its own initiative, it certainly would have the power to close them. The greater power would certainly carry with it the lesser. Notice of such closing by the Special Advisory Committee was given to plaintiff more than two years prior to the institution of this suit. We have held that a letter from a Deputy Commissioner was sufficient notice and also a communicaton from the Assistant to the Commissioner. See *William E. Jones* v. *United States*, 78 C. Cls. 549; and *J. E. Ervine & Company* v. *U. S.*, 81 C. Cls. 534.

However, we do not think it necessary to pass directly on this point because, in our view of the case, the claims were

never reopened and reconsidered, and, therefore, the rejection by the Commissioner in 1928 would prevent any action from being brought more than two years after that time.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge*, and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, concurs in the result.

GREEN, *Judge*, did not hear this case, and took no part in its decision.

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, v. THE UNITED STATES

[No. 43001. Decided December 6, 1937. Plaintiffs' motion for new trial overruled March 7, 1938]

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, v. THE UNITED STATES

[No. 43002. Decided December 6, 1937. Plaintiff's motion for new trial overruled March 7, 1938]

On the Proofs

Income tax; capital gain or loss resulting from distribution in liquidation.—Where a net gain or loss results from amounts distributed in liquidation of a corporation, under Section 115 of the Revenue Act of 1928, it has the same effect as a sale or exchange of capital assets and is to be treated as a capital gain or loss, under Section 101 of the Act.

The Reporter's statement of the case:

Mr. John P. Ohl for the plaintiffs. *Mr. Charles C. Parlin* and *Wright, Gordon, Zachry & Parlin* were on the briefs.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. These two cases have been consolidated for hearing and trial by agreement of counsel. The issues to be determined by the Court are identical in the two cases, the chief of which is whether the loss for 1929 should be treated as an ordinary loss under section 23 (e) of the Revenue Act of 1928 as claimed by plaintiff or as a capital loss under section 101 of the same act as claimed by defendant.

No. 43001

2. Alexander M. White died on September 21, 1929. He was a resident and citizen of the State of New York. Up to the time of his death he was a member of the brokerage firm of W. A. and A. M. White, a partnership, 14 Wall Street, New York. W. A. White is the William A. White referred to in case No. 43002 and the father of Alexander M. White.

3. On November 11, 1929, the Last Will and Testament of Alexander M. White dated September 13, 1928, was admitted to probate by the Surrogate's Court of the State of New York, Nassau County, and letters testamentary thereon were issued by the Court to Harold T. White, Alexander M. White, Jr., and William I. Frothingham and they duly qualified as executors of the estate of Alexander M. White and are now acting in that capacity.

4. Harold T. White, as executor, on March 15, 1930, filed an income tax return for Alexander M. White, deceased, for the taxable period from January 1, 1929 to September 21, 1929 showing a net income of $96,354.65 and a tax thereon of $15,036.89.

5. The income tax of $15,036.89 was paid to the Collector of Internal Revenue for the Second District of New York as follows:

March 15, 1930	$3,759.23
June 14, 1930	3,759.22
September 15, 1930	3,759.22
December 15, 1930	3,759.22
Total	15,036.89

6. On October 7, 1931, the Commissioner of Internal Revenue notified the estate of Alexander M. White that a

redetermination of the tax liability for the taxable period from January 1, 1929, to September 21, 1929, disclosed a deficiency in the income tax amounting to $12,509.74 which was assessed in due course. In redetermining the tax liability the Commissioner treated as capital net loss an item of $104,500 deducted in the return as uncompensated loss. On January 8, 1932, the tax deficiency of $12,509.74 plus interest in the amount of $1,321.75, or a total of $13,831.49, was paid to the Collector of Internal Revenue for the Second District of New York.

7. On December 15, 1932, the executors of the estate of Alexander M. White, deceased, filed a claim on form 843 with the Collector of Internal Revenue for the Second District of New York for the refund of $13,246.94 together with interest. This claim is based upon the alleged error by the Commissioner of Internal Revenue in treating as a capital net loss under Section 101 of the Revenue Act of 1928 an item of $104,500.00 deducted in the return as an uncompensated loss under Section 23 (e) of the same act.

8. On May 9, 1933, the Commissioner of Internal Revenue by registered mail notified the executors of the estate of Alexander M. White, deceased, that the claim for refund in the amount of $13,246.94 was disallowed. The reasons for the rejection of the claim are set forth in a letter from the Commissioner of Internal Revenue dated April 24, 1933, the pertinent parts thereof reading as follows:

> Reference is made to your claim for refund in the amount of $13,246.94 income taxes of the above-named estate for the taxable year 1929.
>
> Your claim is based upon the following issue:
>
> Whether loss of $104,500.00 sustained upon preferred stock of Del-Bay Farms, Incorporated, is a capital loss within the meaning of section 101 of the Revenue Act of 1928, or whether it is an ordinary loss deductible from gross income.
>
> It was previously held by this office following a conference on September 11, 1931, that the loss in question represents a capital net loss within the purview of existing regulations. Article 625 of Regulations 74 provides that any gain to a shareholder on liquidation may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in sec-

tion 101 of the Revenue Act of 1928. It follows that a transaction that would give rise to a capital net gain, if the amount received exceed the cost, would likewise give rise to a capital net loss, if the cost exceeded the amount received.

For the foregoing reasons, it is proposed to disallow your claim. Official notice of the disallowance will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

No. 43002

9. William A. White died on May 6, 1927. He was a resident and citizen of the State of New York.

10. On May 13, 1927, the last Will and Testament of William A. White dated April 15, 1910, was admitted to probate by the Surrogate's Court of the State of New York, Kings County, and letters testamentary thereon were issued by the Court to Harold T. White and Alexander M. White. The persons named duly qualified as executors of the estate of William A. White. Alexander M. White died on September 21, 1929, and Harold T. White is now the sole surviving and acting executor of this estate.

11. On March 15, 1930, Harold T. White as executor filed an income tax return for the estate of William A. White for the calendar year 1929 reporting a net income of $53,882.90 and tax thereon of $3,541.11.

12. The tax of $3,541.11 was paid to the Collector of Internal Revenue for the Second District of New York as follows:

March 15, 1930	$885.28
June 14, 1930	885.28
September 15, 1930	885.27
December 15, 1930	885.28
Total	3,541.11

13. On July 28, 1931, the Bureau of Internal Revenue notified Harold T. White, executor of the estate of William A. White, that a redetermination of the tax liability for the calendar year 1929 in connection with the revenue agent's report disclosed an overassessment of $757.64. The bureau's letter stated, however, that the office had sustained

the revenue agent in his treatment of a loss of $22,500 on the stock of Del-Bay Farms, Incorporated. This loss was treated by the Commissioner of Internal Revenue as a capital net loss and not an uncompensated loss.

On December 31, 1931, a certificate of overassessment for 1929 was forwarded to the estate of William A. White together with a refund check of $801.17, being the overassessment of $757.64 together with interest thereon of $43.53.

14. On December 15, 1932, Harold T. White, as executor of the estate of William A. White, filed a claim on form 843 for refund of $446.06 income tax paid for the calendar year 1929 together with interest thereon. This claim was based on the alleged error by the Commissioner of Internal Revenue in treating as a capital net loss under Section 101 of the Revenue Act of 1928 an item of $22,500 deducted in the return for 1929 as an uncompensated loss under Section 23 (e) of the same act.

15. On May 9, 1933, the Commissioner of Internal Revenue, by registered mail, notified the executor of the estate of William A. White, deceased, that the claim for refund in the amount of $446.06 had been disallowed. The reasons for the rejection of the claim are set forth in a letter from the Commissioner of Internal Revenue dated April 24, 1933. This letter, except for the amounts of tax and of loss involved, is the same as the letter set out in finding 8 herein.

Nos. 43001 and 43002

16. The Seabrook Company was incorporated under the laws of the State of New Jersey in July 1920. It operated a large agricultural and horticultural project near Bridgeton, New Jersey.

17. Alexander M. White became financially interested in the operation of the Seabrook Company and ultimately he, his relatives, and associates lost large amounts of money in the project. The business never was successful and it constantly labored under financial difficulties.

18. The Board of Directors of the Seabrook Company at a meeting held on January 26, 1925, voted to proceed with a plan of readjusting the debt of this corporation. Under

this plan, which was eventually consummated, 7-year 6% mortgage bonds in the total amount of $450,000.00 were issued. Alexander M. White, between February 18, 1925, and March 17, 1927, paid $110,000 for $110,000 face amount of these bonds. During the same period William A. White paid $50,000 for $50,000 face amount of these bonds. In July 1925 the Seabrook Company's name was changed to Del-Bay Farms, Inc., hereinafter referred to as the New Jersey corporation. Alexander M. White, his relatives, and associates owned the entire issue of these bonds and more than a majority of the voting stock of the New Jersey corporation.

19. The fortunes of the New Jersey corporation continued to decline and a plan of reorganization was formulated, at the instigation of Alexander M. White, providing for the incorporation of a new Delaware company to continue the enterprise and to acquire all of the properties of the New Jersey corporation through judicial proceedings for 4,500 shares of the new Delaware company's preferred stock which was to be distributed to the holders of bonds of the New Jersey corporation at the rate of 10 shares per $1,000 bond. The bonds were to be deposited with the firm of W. A. and A. M. White for the purpose of enabling Alexander M. White to carry out the plan.

Pursuant to the plan of re-organization Del-Bay Farms, Incorporated, was incorporated under the laws of the State of Delaware for the purpose of acquiring the properties of the New Jersey corporation.

20. Proper judicial proceedings were instituted and consummated. The holders of all of the $450,000 principal amount of bonds of the New Jersey corporation deposited their bonds on or before June 23, 1927, with the firm of W. A. and A. M. White for the purpose of enabling Alexander M. White to carry out the plan of reorganization.

21. Pursuant to Court decree, all of the properties of the New Jersey corporation were sold at judicial sale on June 28, 1927, which sale was duly confirmed by the Court. All of the mortgaged assets were purchased by Alexander M. White pursuant to the plan heretofore referred to for $410,434.58 subject to certain underlying mortgages total-

ing $316,000. This bid was satisfied to the extent of $66,-999.46 by cash which was applied to expenses taking precedence over the claims of the bondholders, and a small balance thereof going toward making a small distribution to unsecured claim holders. The balance of $343,435.12 of this bid was satisfied by crediting the bonds on their pro rata share of the proceeds of the sale, each $1,000 bond being stamped to indicate payment to the extent of $763.19. Alexander M. White assigned the bid and turned over the stamped bonds to the Delaware corporation and by deed of conveyance dated October 13, 1927, joined in by everyone in interest and approved by the Court, the properties were transferred to the Delaware corporation. In consideration of the properties so acquired, the Delaware corporation issued 4,500 shares of its preferred stock and distributed them to the holders of the bonds of the New Jersey corporation at the rate of 10 shares for each $1,000 face amount of such bonds.

22. The unmortgaged assets consisting principally of growing crops were likewise bid in for $14,565.42 in cash and conveyed to the Delaware corporation. After paying expenses and making a small distribution to unsecured creditors, there was no equity for or distribution made to the stockholders of the New Jersey corporation.

There was also issued and distributed to the former holders of bonds of the New Jersey corporation five shares of common stock in the Delaware corporation for each $1,000 face amount of such bonds. Alexander M. White, his relatives, and associates held a majority of the common stock of the Delaware corporation. This stock turned out valueless before December 1928.

23. Alexander M. White received as his part of the distribution made pursuant to the plan of reorganization 1,100 shares of preferred stock of the Delaware corporation for his $110,000 face amount of bonds of the New Jersey corporation. The estate of William A. White received as its part 500 shares of preferred stock in the Delaware corporation for its $50,000 face amount of bonds of the New Jersey corporation.

24. In December 1928 the Delaware corporation, by order of its Board of Directors, entered into an executory con-

tract to sell all of its assets, except its bank balance, and the sale was consummated in February 1929. The Delaware corporation was dissolved on April 11, 1929, its activities ended and its office closed. Following this, a liquidating dividend of $5.00 was paid on each share of preferred stock whereupon such stock became worthless. Alexander M. White received $5,500 on his 1,100 shares of preferred stock and the estate of William A. White received $2,500 on its 500 shares of preferred stock. The stock certificates were never surrendered or transferred and the executors of both estates are still in possession of such certificates.

No. 43001

25. The difference between $110,000, the cost of the bonds of the New Jersey corporation to Alexander M. White, exchanged for the preferred stock of the Delaware corporation, and the $5,500 received as a liquidating dividend by him on the preferred stock of the Delaware corporation, is $104,500, the loss claimed to be sustained upon the preferred stock.

No. 43002

26. In its estate tax return for the calendar year 1927 the estate of William A. White gave in the value of the $50,000 face amount of the bonds of the New Jersey corporation at $25,000. This value was accepted by the Commissioner of Internal Revenue. The difference between $25,000 and $2,500 received by the estate of William A. White as a liquidating dividend on the preferred stock of the Delaware corporation is $22,500, the loss claimed to be sustained upon the preferred stock.

The court decided that the plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The two suits above entitled are each brought upon claims for refund. In case No. 43001, the recovery of $13,246.94 with interest is asked; in case No. 43002, $446.06

with interest is sought to be recovered. In both cases the recovery is sought on the ground of alleged overpayments of income taxes. The suits are brought by the respective executors of Alexander M. White in No. 43001 and William A. White in No. 43002. Refund claims were duly filed by the testators. In No. 43001, the plaintiffs contend that the Commissioner of Internal Revenue erred in treating as a capital loss on the liquidation of preferred stock an item of $104,500, deducted as an ordinary and uncompensated loss in the income tax return for the year involved. The same contention is made by the executor of William A. White in No. 43002 with regard to a loss of $22,500 sustained on the same liquidation of preferred stock and deducted as an ordinary loss in the tax return. The issue in both cases is whether the action of the Commissioner was correct.

The findings show that sometime prior to March 18, 1927, Alexander M. White [No. 43001] acquired for cash bonds of the Seabrook Company of the face value of $110,000. This corporation operated a large agricultural and horticultural project in New Jersey. In 1925 its name was changed to Del-Bay Farms, Inc., which will hereinafter be referred to as the old or New Jersey corporation.

March 18, 1927, William A. White [No. 43002] also acquired for cash bonds of the same issue in the amount of $50,000 face value.

Alexander M. White, his family, relatives, and associates owned the entire issue of the corporation bonds and a majority of the voting stock of the New Jersey corporation.

The old corporation fell into financial difficulties which led to a plan for reorganization which involved the foreclosure of the bonds upon the property of the old corporation and the acquisition of its property by a new corporation through judicial proceedings. Acting in accordance with this plan, Alexander M. White, for the bondholders, purchased the properties of the old corporation at a judicial sale made subject to certain prior mortgages. The bonds were applied on the purchase price to the extent of approximately $763.19 per $1,000 and stamped paid to that extent. The remainder of the purchase price was paid by Alex-

ander M. White who assigned his bid to the newly incorporated Del-Bay Farms, Incorporated, organized in conformity to his plan, and by deed dated October 13, 1927, in which he was joined by all parties in interest, there was conveyed to the new Delaware corporation title to the properties bought in by him at the foreclosure sale.

In consideration of the receipt of the mortgaged assets the new corporation issued preferred stock of which Alexander M. White received as his share of the distribution made to the former holders of mortgage bonds of the New Jersey corporation 1,100 shares. William A. White having deceased, his estate received from the distribution mentioned 500 shares of the preferred stock of the Delaware corporation. There was no equity for or distribution to the stockholders of the old New Jersey corporation.

We need not set out in detail all of the proceedings which are shown by the findings. It is sufficient to say that the parties agree that the new Delaware company sold all of its assets and paid a liquidating dividend of $5 on each share of the preferred stock which thereupon became worthless, resulting in the loss on the bonds of the New Jersey corporation acquired by Alexander M. White in the sum of $104,500 and a similar loss on the bonds acquired by William A. White of $22,500.

The case turns on the construction of sections 101 and 115 of the revenue act of 1928 as applied to capital gains and losses.

Subsections (a) and (b) of section 101, in determining the tax to be levied under (a) upon a capital net gain and under (b) in case of a capital net loss, provide that the tax shall be determined upon the capital net gain (or capital net loss) "as hereinafter defined in this section," and under "definitions" subdivision (c) (2) states that—

"Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

It is argued on behalf of plaintiff in each of the cases now before us that there was no "sale or exchange of capital assets." In the ordinary sense of the terms there was not,

but section 115 provides with reference to distributions by corporations in subdivision (c)—

> (c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock.

We think the two sections should be considered together, and when so construed we find that the statute first defines a capital net loss as resulting from the sale or exchange of capital assets, and later provides that amounts distributed in complete or partial liquidation shall be treated as made in exchange for the stock. The provisions of section 115 make a liquidating dividend have the same effect as a sale or exchange of property. This is the rule implied in Article 625 of Regulations 74 which plaintiffs contend is void but which under the view that we have stated above is valid. In this connection it will be noted that section 201 (c) of the revenue acts of 1924 and 1926 is identical with section 115 (c) of the act of 1928 with respect to the matters now being considered. Congress would seem to have approved the Commissioner's interpretation of the provisions of the 1924 and 1926 acts by reenacting them in the 1928 act.

A number of cases have been cited by counsel for plaintiff in support of their contention that there was no sale or exchange in either of the instant cases. We think, however, that nothing contained therein has any application except in the case of *William C. Rands* v. *Commissioner*, 34 B. T. A. 1107, but the decision therein has been overruled by the case of *Mary S. Childs* v. *Commissioner*, 35 B. T. A. 1125. The case last cited supports the application of the statute as we have construed it.

What we have said above makes it unnecessary to consider the other objections made by defendant to the claim sued upon in No. 43002, and it follows that the petition in each of the cases under consideration must be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

THE ELSTON COMPANY (FORMERLY KNOWN AS UNITED STATES BREWING CO. OF CHICAGO), A CORPORATION, TO THE USE AND BENEFIT OF UNITED STATES BREWING CO., A CORPORATION, v. THE UNITED STATES

[No. 43017. Decided December 6, 1937]

On the Proofs

Income tax; deduction for loss due to Prohibition Act.—Where Chicago brewery held saloon licenses which it had purchased prior to Prohibition Act of 1919, and 18th Amendment, and which became worthless by reason of these enactments, deduction of loss so sustained is allowable. *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638; *William Zakon* v. *Commissioner*, 7 B. T. A. 687; *McAvoy* v. *Commissioner*, 10 B. T. A. 1017 cited. *Clarke* v. *Haberle Crystal Springs Brewing Co.*, 280 U. S. 384 and *Renziehausen* v. *Lucas*, 280 U. S. 387, distinguished.

The Reporter's statement of the case:

Mr. Lee I. Park for the plaintiff. *Messrs. William J. Froelich*, *Dwight H. Green*, and *Hamel, Park & Saunders*, were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff was organized as a corporation under the laws of Illinois June 1, 1889, as the United States Brewing Co. of Chicago, Illinois. By appropriate amendment of its charter, its name was changed to The Elston Company, December 29, 1933. It is still in existence as a corporation under and by virtue of the laws of Illinois.

2. The United States Brewing Co. was organized as a corporation under the laws of Delaware August 18, 1933. December 30, 1933, the United States Brewing Co. acquired and succeeded to, pursuant to a plan of reorganization, all the assets, business, and good will of plaintiff, except cash in the amount of $1,000, and issued in exchange therefor its

entire authorized capital stock, consisting of 10,000 shares of common stock of a par value of $100 per share. The 10,000 shares were, on the same date, December 30, 1933, transferred to Edward Landsberg, who also owned all the outstanding stock of plaintiff.

3. Prior to June 30, 1919, plaintiff was engaged principally in the manufacture and sale of beer containing more than one-half of one per cent of alcohol by volume. On that date it was forced to discontinue that particular business as a result of prohibition legislation.

4. June 25, 1906, the city council of the city of Chicago, Illinois, enacted an ordinance generally known as the Harkins limitation ordinance, which limited the number of saloon licenses that might be issued by the city authorities to one for every 500 of the population of the city as ascertained by the last preceding school census, provided, however, that each and every one of the saloon licenses issued and in force on July 31, 1906, might be renewed by the city even though the aggregate number of licenses exceeded the number contemplated by the ordinance on a population basis.

The ordinance further provided:

> SECTION 3. The owner or owners, or his or their legal representatives, of a license to keep a dramshop or a saloon shall have and be given the right to a renewal or reissue of such license at the same or different place of business upon compliance with the ordinances now in force in the city of Chicago, or which may hereafter be passed governing the licensing of dramshops or of saloons, and such owner or owners, or his or their legal representatives, of a dramshop or saloon license may assign or convey his right to the renewal or reissue thereof to another person, who, upon full compliance with the ordinances then in force in the city of Chicago governing the licensing of saloons or dramshops shall be entitled to a renewal or reissue of such license in his own name, and each holder of a license, or his legal representatives, in turn may assign or convey such right of renewal or reissue of such license upon the same terms and conditions as the original owner thereof could do hereunder. The privilege of renewal or reissue provided by this ordinance shall apply only so long as the license in each case shall have been kept in force

continuously and uninterruptedly in the name of the licensee, or his successor in interest. No license to keep a saloon or dramshop shall be hereafter issued to a firm except in the names of the individual members of the firm, and no such license shall hereafter be issued to a corporation; provided, however, that any corporation now holding such a license in its name, may designate the person or persons who shall be entitled to a renewal or reissue of such license for the license period beginning November 1, 1906; provided further, however, that such person or persons shall duly qualify by complying with all the laws and ordinances in force at the time in the city of Chicago.

The question of granting or rejecting an application for a license or a renewal thereof rested solely in the sound discretion of the appropriate city officials.

In March 1911 the ordinance was reenacted and became a part of the City of Chicago Code of 1911. It was again amended in July 1911.

October 26, 1912, the Supreme Court of the State of Illinois in *People ex rel. Fitzgerald* v. *Harrison*, 256 Ill. 102, 99 N. E. 903, decided that the section of the Harkins limitation ordinance which limited the number of saloon licenses in proportion to the population was valid but that the provision for the renewal of saloon licenses and the assignment of renewal rights was invalid. The ordinance was again amended March 9, 1914, to provide for the recording of renewal rights of saloon licenses, and for a recording fee of $1.00. It was again amended in March 1915, September 1918, and March 1919. The amendment of September 1918 provided for the division of the license year into four parts instead of two, as theretofore prevailed. The amendment of March 1919 provided for the division of the license year into six parts instead of four. The license fee was $1,000 per annum, payable in advance when the license was issued. However, with the divisions of the year, first into two six-month periods, later into four three-month periods, and still later into six two-month periods, a proportional amount of the annual fee would be payable for each period, for example, $500 for a six-month period, and a license would be issued only for the period for which the fee was paid. The license fee was paid by the saloonkeeper and

the license issued therefor constituted a permit to him to conduct a saloon at a given place for the particular period specified therein.

5. At the time of the enactment of the Harkins limitation ordinance in 1906 and as of July 31, 1906, the number of licenses theretofore issued and then in force for the keeping of a saloon or dramshop in the city of Chicago, which licenses were renewable under the provisions of said ordinance, was greatly in excess of the number of such licenses issuable under such ordinance on the basis of one for every 500 of the population of the city of Chicago. From the time of the enactment of the ordinance until June 30, 1919, the population of the city of Chicago did not increase to a point where, on the basis of one license for every 500 of the population, the number of such licenses issuable in the city of Chicago under the ordinance equalled the number of such licenses actually issued and in force under the provision of the ordinance allowing renewal of existing licenses, as heretofore stated.

6. From 1906 to 1918 it was the uniform custom and practice in the city of Chicago, Illinois, among those interested in the liquor business, to purchase and sell renewal rights of saloon licenses, and the city officials of the city of Chicago, including the city collector, administered the Harkins limitation ordinance in full recognition of such custom and practice. Such rights permitted the renewal of the license at the same or another location, in the manner and under the conditions provided by existing laws and ordinances. Even after the *Fitzgerald* decision, the assignees of such renewal rights were never refused licenses unless, under the police power of the city of Chicago, exercised in conformity with the provisions of the ordinance, such assignees were deemed unfit or improper persons to operate saloons. Many such renewal rights were purchased during this period by brewery corporations with the full knowledge and approval of the city officials. As a part of his official duties the city collector kept an alphabetical list of actual owners of renewal rights, and in the case of renewal rights owned by a brewery corporation the brewery would be listed in that record as the owner even though the official record listed

the legal title as being in employees. In such cases the city collector recognized requests and orders from the brewery corporation rather than the record-holder of the title. The city officials furnished forms to breweries and others for assignments of renewal rights and required that they be recorded with the city collector, for which a recordation fee of $1.00 was charged. It was to the interest of the city to recognize such assignments so as to avoid the lapsing of saloon licenses and the resulting loss in renewal fees of $1,000 per license per annum.

7. Sometimes a dispute would arise as to the ownership of a particular renewal right. In such cases it was the custom and practice for the city collector's office, acting in conjunction with the corporation counsel's office, to hold a hearing, and at such hearing to give all interested parties full opportunity to be heard and to send to all those interested, including the brewery corporations, written notice of such hearing, and the time and place of such hearing. At such hearing it was the custom and practice for the interested parties to appear, usually with counsel, and to present to the representatives of the city collector and the corporation counsel, who were conducting such hearing, evidence with respect to the question of which one owned the particular right of renewal.

8. In December 1916 the mayor of the city of Chicago issued a report in which he stated that "Approximately 53%, or 3,698 of the 7,094 city saloon licenses in this city, are controlled or owned by the licensees; 3,043 saloon licenses, or about 43% of the total, are owned by breweries; and the remaining 255 saloon licenses, or approximately 4%, are owned by individuals other than the licensees and breweries, and consist largely of persons who are related to licensees or have some connection with the breweries."

9. The procedure which a purchaser of a renewal right had to follow in obtaining and recording his assignment and in obtaining a new license was as follows:

Upon the purchase of a renewal right the purchaser would take an assignment from the licensee on a form provided by the city collector's office. In the case of a purchase by a brewery corporation the assignment would be taken in the

name of one of its employees. The brewery corporation, however, would, for its own protection, take a reassignment from the employee. The assignment would then be recorded with the city collector in a book kept in the city collector's office for that purpose as a part of the city collector's official duties. Each page in that book bore a heading entitled "Saloon License Reference Book," and was divided into columns designated as "Ward," "Assignment Number 1st Period," "Assignment Number 2d Period," "Street and Number," "Name," "Full Year," "1st Period," "Assigned and Remarks," "2d Period," "Assigned and Remarks," "Precinct." For recording the clerk received a fee of $1.00, and issued a receipt therefor to the owner of the renewal right. Where the brewery had the beneficial ownership of the renewal right the receipt would be issued in the name of the brewery and stamped with a brewery corporation stamp.

At the expiration of any given license period the assignee could either obtain a new license in his own name or instruct the city authorities to issue the license in the name of some other designated person. Upon paying the required fee and filing the grocery and saloon bonds required by the city collector, the applicant would be given an order on the city collector to issue a license to the party designated (and in some cases a certificate showing him to be entitled to a license). The applicant then took the certificate and order to the city clerk, who issued him a license for the period designated. The license forms were kept by the city clerk in a book containing both forms and information stubs. The information stub provided for a record as follows:

No. ______________________________

Issued ______________________________

Licensee ______________________________

Address ______________________________

DRAMSHOP OR SALOON—1911

Full Year

May 1, 1911, to April 30, 1912

Fee, $1,000.00.

Collector's Assignment No. ______________________________

Assigned from ______________________________

Address ______________________________

License No. (last preceding period) ______________________________

When a license was issued this stub would be filled in by the city clerk. The stubs constituted a permanent record in the city clerk's office kept by the city clerk as a part of his official duties.

Upon the expiration of the license the owner of the renewal right could obtain a license for a further license period by following the same procedure and paying the license fee on the basis of $1,000 per year. In cases where renewals were desired by plaintiff upon expiration of a license period, plaintiff followed the procedure of executing a reassignment to the original owner to reinvest him with title and simultaneously with the issuance of the reassignment plaintiff would receive from the original owner an assignment of the new license, such assignment to be effective when the new license was issued. A new assignment of the renewal right was necessary at the expiration of each license period.

10. Renewal rights first began to have real value as a result of the Harkins limitation ordinance about 1909, or the early part of 1910. Plaintiff was able to acquire 186 renewal rights without cost prior to the time renewal rights acquired a market value. From the latter part of 1909 to March 1, 1913, plaintiff acquired by purchase renewal rights to 143 saloon licenses in the city of Chicago and paid therefor in cash the sum of $173,209.47. Each of the renewal rights theretofore acquired had a fair market value as of March 1, 1913, at least equal to the cost thereof.

Subsequent to March 1, 1913, plaintiff acquired by purchase and assignment renewal rights of 53 saloon licenses in the city of Chicago and paid therefor in cash the sum of $85,366.23, exclusive of the renewal fees of $1,000 per license.

11. The 196 renewal rights purchased as aforesaid and the 186 acquired at no cost were kept in full force and effect by subsequent renewals from the date of their purchase, and were constantly used in plaintiff's business until after the beginning of its fiscal year ended September 30, 1919. They became worthless and were abandoned by plaintiff during that year by reason of the effect of the eighteenth amendment to the Constitution of the United States, and the War-Time Prohibition Act, which became effective and prohibited the manufacture and sale of plaintiff's beer of an alcoholic

content in excess of one-half of one per cent by volume after June 30, 1919. Prior to the fiscal year ended September 30, 1919, plaintiff abandoned 158 renewal rights in 1915 and 29 such rights in 1917, exclusive of the 196 and 186 rights referred to above.

After the advent of national prohibition plaintiff manufactured and sold near-beer until the manufacture and sale of beer was again legalized, April 7, 1933. The near-beer was sold in some of the places where plaintiff's beer had been previously sold. However, sales of near-beer were governed by a new and different ordinance from that which existed for the sale of beer, no limitations being placed on the number of licenses which could be issued and no renewal rights being involved thereunder.

12. The purchase and ownership of renewal rights of saloon licenses by plaintiff aided, and were advantageous to, it in the conduct of its business. In obtaining the renewal rights of saloon licenses plaintiff did not take the same in its own name (the ordinances heretofore referred to specifically prohibiting the issuance of such a license to a corporation), but had the assignments made out to employees on forms provided by the city of Chicago for that purpose. These assignments were recorded in books kept for that purpose at the city collector's office as a part of the city collector's official duties. Reassignments were executed by these employees and were left in the possession of plaintiff for its protection in case anything should happen to said employees. Plaintiff, however, had beneficial ownership and control of these renewal rights, and in the assignments of renewal rights in the names of plaintiff's employees the city officials recognized such ownership and control.

13. Renewal rights to Chicago saloon licenses were recognized as property by trustees in bankruptcy appointed by district courts of the United States, and were sold by such trustees as property belonging to the bankrupt's estate.

14. No part of the cost of the 196 renewal rights purchased as set forth above was allowed by the Commissioner of Internal Revenue as a deduction from plaintiff's gross income for any year prior to the fiscal year ended September 30, 1919.

Reporter's Statement of the Case

15. December 15, 1919, plaintiff filed with the collector of internal revenue at Chicago a tentative income and profits tax return for the fiscal year ended September 30, 1919, showing an estimated tax liability of $31,500, of which $6,403.14 was paid by plaintiff to the collector on the same date.

16. April 15, 1920, plaintiff filed with the collector of internal revenue at Chicago its final income and profits tax return for the fiscal year ended September 30, 1919, showing no income or profits tax liability for that year.

17. By letter dated July 27, 1926, the Commissioner of Internal Revenue determined additional income and profits taxes against plaintiff for the fiscal year ended September 30, 1919, in the amount of $232,858.64. That amount, and the balance of $25,096.86, shown by the tentative return, together with interest thereon, were paid by plaintiff to the collector of internal revenue at Chicago, Illinois, as follows:

Additional tax per letter of July 27, 1926	$232, 858. 64
Interest thereon	7, 062. 31
Total paid in cash, Oct. 7, 1926	239, 920. 95
Balance due on tentative return	25, 096. 86
Interest thereon to Oct. 15, 1926	8, 467. 70
Total	33, 564. 56
1917 overassessment credited prior to Oct. 7, 1926	4, 091. 47
Total paid in cash, Oct. 15, 1926	29, 473. 09

All assessments and payments of taxes involved in this suit were timely made pursuant to a waiver duly executed and filed by plaintiff.

18. March 19, 1930, plaintiff filed with the collector of internal revenue at Chicago, Illinois, a claim for refund for the fiscal year ended September 30, 1919, in the amount of $253,864.03. One of the grounds for recovery alleged in said claim was as follows:

> 1. For several years prior to the taxable year the taxpayer owned and used in its business 569 Chicago saloon licenses which cost $375,084.08 and had a value on March 1, 1913, of $1,479,400.00. During the taxable year 382 of such licenses, costing $258,575.70, and having a value

on March 1, 1913, of $993,200.00, became worthless and of no value. Taxpayer, therefore, claims a loss on the March 1, 1913, value of $993,200.00, and if such amount is not allowable then the cost of these licenses of $258,575.70 is claimed as a deduction.

19. March 4, 1933, the Commissioner determined and allowed a refund to plaintiff for the fiscal year ended September 30, 1919, in the amount of $64,678.53, and issued a certificate of overassessment in favor of plaintiff for that amount. In that determination the Commissioner included the cost of the 196 renewal rights of saloon licenses in invested capital, but did not allow any deduction on account of the loss claimed with respect thereto.

20. Plaintiff's net income and statutory invested capital for the fiscal year ended September 30, 1919, after adjustment for taxes paid, but exclusive of any deduction for losses of renewal rights on saloon licenses, were as follows:

Net income (exclusive of any deduction for loss of renewal rights)	$1,151,030.92
Invested capital (including cost of renewal rights in the amount of $258,575.70)	9,582,067.17

21. The refund of $64,678.53, referred to in finding 19, together with interest thereon in the amount of $25,181.44, was duly received by plaintiff. No other refunds have ever been received by plaintiff for the fiscal year ended September 30, 1919, and no refunds have ever been made to plaintiff on account of losses claimed with respect to abandonment of renewal rights of saloon licenses for the taxable year ended September 30, 1919.

22. May 18, 1933, the Commissioner mailed to plaintiff by registered mail a notice that the balance of its claim for the fiscal year ended September 30, 1919, had been disallowed on a schedule dated March 7, 1933.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover $87,593.79, an alleged overpayment of income and profits taxes for the fiscal year ended

September 30, 1919, together with interest thereon from the date of payment. The claim is based upon the failure of the Commissioner of Internal Revenue to allow as a deduction from gross income the sum of $258,575.70, representing plaintiff's cash investment in renewal rights of Chicago saloon licenses which became worthless during the year. The deduction is claimed by virtue of the provisions of sections 202 (a) and 234 (a) (4) of the Revenue Act of 1918. These provisions are:

> SEC. 202 (a). That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be:
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof * * *
>
> SEC. 234 (a). That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

Prior to June 30, 1919, plaintiff was engaged in the business of manufacturing and selling beer containing more than one-half of one percent of alcohol by volume. On that date it was forced to discontinue that business as the result of prohibition legislation.

In 1906 the city of Chicago enacted an ordinance known as the Harkins limitation ordinance, which limited the number of saloon licenses that might be issued by the city authorities to one for every 500 of the population of the city. It was provided, however, that each and every one of the saloon licenses issued and in force on July 31, 1906, might be renewed by the city even though the aggregate number of licenses exceeded the number provided for in the ordinance on a population basis. At the time of the enactment of the Harkins limitation ordinance in 1906, and as of July 31, 1906, the number of licenses issued and then in force for saloons and dramshops in the city of Chicago, which licenses

were renewable under the provisions of the ordinance, was greatly in excess of the number of such licenses issuable under the ordinance on the basis of one for every 500 of the population of the city. From the time of the enactment of the ordinance until June 30, 1919, the population of the city of Chicago did not increase to a point where, on the basis of one license for every 500 of population, the number of such licenses issuable under the ordinance equalled the number actually issued.

From 1906 to the beginning of the fiscal year 1919, it was the custom and practice in the city of Chicago to purchase and sell renewal rights of saloon licenses and the city officials administered the Harkins limitation ordinance in full recognition of such custom and practice. While the renewal of the licenses rested entirely within the discretion of the administrative authorities it had been the universal practice of such authorities to issue licenses to holders of old licenses or the registered assignees of such original holders. The issuing of new licenses to holders of old licenses had become so well established that these renewal rights were considered very valuable and were bought and sold with the full knowledge and consent of the city authorities. They were recognized as property by trustees in bankruptcy appointed by the district courts of the United States and were sold by such trustees as property belonging to the bankrupt's estate.

At the beginning of the fiscal year 1919 plaintiff owned 382 saloon license renewal rights. Of this number 186 had been acquired without cost to plaintiff prior to the time renewal rights had acquired a market value. Of the remaining 196 renewals plaintiff purchased 143 prior to March 1, 1913, at a cost of $173,209.47, which on March 1, 1913, had a fair market value at least equal to their cost, and 53 of such renewal rights were purchased by plaintiff subsequent to March 1, 1913, at an actual cost of $85,366.23. All these renewal rights became worthless and of no value whatever during the taxable year 1919 and were abandoned by plaintiff during the year by reason of the effect of the impending ratification of the Eighteenth Amendment to the Constitution and the war time Prohibition Act which became effective on and after June 30, 1919.

Opinion of the Court

The sole question in the case is whether the sum of $258,575.70, the cost of plaintiff's investment in renewal rights of Chicago saloon licenses, which became worthless and of no value within the taxable year 1919, is deductible from its gross income for the year as a loss within the meaning of section 234 (a) (4), *supra*, of the Revenue Act of 1918.

Coming directly to the issue presented we are of the opinion plaintiff is entitled to the deduction claimed. There can be no question, we think, that renewal rights of saloon licenses involved in this case constituted property within the meaning of section 202 of the Revenue Act of 1918 which fixes the basis for gain or loss "from the sale or other disposition of property, real, personal, or mixed." This property represented an actual cost to plaintiff of $258,575.70. It became absolutely worthless and was abandoned by plaintiff in the year 1919. This brings the claim squarely within the meaning of the language of section 234 (a) (4) of the Revenue Act of 1918—"losses sustained during the taxable year and not compensated for by insurance or otherwise"—as such words are ordinarily used and understood. Article 143 of Regulations 45, promulgated for the administration of the 1918 Act, is equally clear:

> ART. 143. *Loss of useful value.*—When through some change in business conditions the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in the business, he may claim as a loss for the year in which he takes such action the difference between the cost or the fair market value as of March 1, 1913, of any asset so discarded (less any depreciation sustained) and its salvage value remaining. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property must be prematurely discarded, as, for example, where an increase in the cost of or other change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. * * *

Opinion of the Court

It thus appears that both the statute and the regulations in unambiguous terms cover the loss claimed in this case and authorizes its deduction from gross income for the year in which it was sustained. The fact that plaintiff is a brewer is immaterial and has no bearing on the case, as the taxable incomes of brewers are arrived at according to the rules that govern taxable incomes of others. *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638.

The defendant in the brief says: "the decisions denying similar claims are numerous," and cites various cases which it contends support that proposition. Examination of the cases cited reveals the fact that in each of them the deduction was claimed under section 234 (a) (7) or section 214 (a) (8) because of obsolescence of good will. In *Clarke* v. *Haberle Crystal Springs Brewing Co.*, 280 U. S. 384, the Supreme Court laid down the rule that the obsolescence of good will was not a deductible loss under section 234 (a) (7) of the Revenue Act of 1918, and in *Renziehausen* v. *Lucas*, 280 U. S. 387, decided on the same date, held that the same rule applied to an individual engaged in the liquor business. Obviously these decisions are not controlling in the instant case where an entirely different loss claim from that of the obsolescence of good will is involved. The Supreme Court in the *Gambrinus case*, *supra*, stated that the language used in the *Haberle case* definitely limits the opinion "to obsolescence of good will." Since the other cases cited by the defendant all deal in loss deductions claimed by the obsolescence of good will resulting from prohibition no useful purpose would be served by a detailed discussion of them. It is sufficient to say they are not in point and in no way support the defendant's contention that "the decisions denying similar claims are numerous." Careful search discloses no case in which the Supreme Court or any other court with jurisdiction in Federal Income tax matters has held that a loss claim similar to the one involved here is not deductible. On the other hand the Board of Tax Appeals, in well considered decisions from which the Commissioner has taken no appeal, although he had the right to do so, has held that deduction claims identical in every respect with that of the present case are allowable.

William Zakon v. *Commissioner*, 7 B. T. A. 687, involved renewal rights of saloon licenses in the city of Boston. In allowing the deduction claimed the Board said:

> While such licenses were issued annually, expiring on May 1 of each year, it was the established custom of the board to issue such annual licenses to the holders of licenses for the previous year. The holders of any license might transfer it to another, to whom a new license would be issued by the license board, if the purchaser were found to be acceptable by the board. Under such circumstances the holder of such a license had an asset which had a value entirely separate and distinct from the right to conduct the business of a liquor dealer for the remainder of the year for which such license was issued. The courts have recognized that such value existed and constituted property rights. * * *
>
> The license cost the petitioner $11,000 in 1911. In 1913, it had a value in excess of that amount. In 1919, it became worthless. The taxpayer sustained a loss of $11,000 which is deductible in 1919. The good will, however, appears to have cost the taxpayer nothing and under the decisions quoted there is no deductible loss on account of that item.

McAvoy v. *Commisisoner*, 10 B. T. A. 1017, like the instant case, involved renewal rights of saloon licenses in the city of Chicago, the facts being essentially the same as those in the instant case. In allowing the deduction claimed the Board said:

> In the opinion of the Board, the contention advanced by the respondent that a loss cannot be allowed since the petitioner did not own property which it lost when prohibition became effective, is unsound. While that which petitioner lost may not conform to some technical definitions of property, it cannot be denied that the petitioner acquired something of value which it subsequently lost. In the business which petitioner conducted, it was highly essential that it have a market for its products. One of its principal markets was the saloon, but it was not permitted to hold a saloon license or operate a saloon. What it did, therefore, was to purchase these renewal rights and it was thereby in a position to have the saloon licenses issued to persons who would agree to purchase its product. By this

means petitioner's income was increased. When the "War-time Prohibition Act" became effective and prohibited the manufacture and sale of petitioner's product after June 30, 1919, whatever rights or privileges it formerly enjoyed with respect to these renewal rights were no longer of value. Petitioner paid substantial amounts for these assets, and this investment was lost when prohibition became effective and their use or value to it ceased to exist.

* * * * * * *

In view of the foregoing, the Board is of the opinion that the petitioner suffered a loss in the fiscal year ended September 30, 1919, which is deductible under the provisions of section 234 (a) (4) of the Revenue Act of 1918.

Best Brewery Co. v. *Commissioner*, 16 B. T. A. 1354, also involved renewal rights of saloon licenses of the city of Chicago. The Board followed its decisions in the *Zakon* and *McAvoy cases* and held that the cost of such licenses becoming worthless in 1919 following prohibitory legislation was a proper deduction under the provisions of section 234 (a) (4) of the Revenue Act of 1918.

The defendant suggests that the Board cases just referred to were decided prior to the decisions of the Supreme Court in *Clarke* v. *Haberle Crystal Springs Co.*, *supra*, and *Renziehausen* v. *Lucas*, *supra*. But the fact is immaterial unless the loss deductions claimed in the Board cases can be classified with good will. Obviously they cannot be so classified. The renewal rights of saloon licenses in those cases, as in the instant case, were income producing assets, subject to purchase, sale and assignment, separate from the business itself. They were assignable assets distinct from the business. In this respect they were in the same category with patents, contracts, and franchises. They became absolutely worthless and were necessarily abandoned in the taxable year 1919 as a result of prohibitory legislation. An ordinary taxpayer would, we think, undoubtedly be entitled to deduct such loss in computing his taxable income, and under the doctrine of the *Gambrinus* case plaintiff's taxable income must be arrived at according to the rules that govern taxable income of others.

From what has been said it follows that plaintiff is entitled to recover, and is hereby awarded a judgment in the sum of $90,250.40, with interest as provided by law. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

DUKE E. STUBBS AND ELIZABETH S. STUBBS v. THE UNITED STATES

[No. 43093. Decided December 6, 1937]

On the Proofs

Damages under special jurisdictional act.—Terms of the special Act are sufficiently broad to give plaintiffs right to recover any loss or damage arising out of extension of Mt. McKinley National Park limits.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiffs.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiffs herein are the claimants mentioned in the special jurisdictional Act of June 14, 1935, Private No. 81, 74th Congress, First Session, reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claim, or claims, of Duke E. Stubbs and Elizabeth S. Stubbs, or either of them, both of McKinley Park, Alaska, for any losses and damages sustained by Duke E. Stubbs and Elizabeth S. Stubbs in the silver fox farming and trading post business, or other business and occupation, conducted by them, or either of them, at McKinley Park, Alaska, arising out of the extension of the limits of the Mount McKinley National Park by an Act of

Congress approved on the 19th day of March 1932 (47 Stat. 68), and/or by virtue of any acts, or actions, of any and all officers and employees of the United States in carrying out or in connection with the extension of the limits of Mount McKinley National Park after the 19th day of March 1932: *Provided*, That the action in the Court of Claims to establish such losses and damages may be instituted within one year from the date of the approval of this Act, and the same right of appeal to the United States Supreme Court from the judgment of the Court of Claims shall be had as in other causes in that court.

The petition was filed in this court July 19, 1935.

2. The plaintiffs are husband and wife, citizens of the United States, and went to Alaska in 1908. The husband, Duke E. Stubbs, engaged first in prospecting, and in course of time, with his wife, Elizabeth S. Stubbs, also conducted a store. They traded to some extent in furs and became interested in the raising of foxes for their fur, read and studied books, magazines, and Government publications on the subject, and began raising red foxes and crosses in a small way soon after they settled in the valley of the Kuskokwim River in or about the year 1910.

Plaintiffs left the Kuskokwim Valley in 1922 and located in Fairbanks. Shortly after removing to Fairbanks Mr. Stubbs began looking for a site on which to establish a silver-fox farm. He had in mind certain requisites for a proper site, among them good drainage, an abundance of feed natural to silver foxes such as rabbits, porcupines, and parka squirrels, a sandy, gravelly, or rocky soil, high elevation, light rain and snow, and temperature that would reach forty to sixty degrees below zero. Mr. Stubbs spent an elapsed period of two years in the search, at the end of which he determined upon the vicinity of Mount McKinley National Park, as a site answering these specifications. This site recommended itself to him also on account of its lack of insects, the presence of good timber, sweet mountain air, and the prospect of trade with tourists visiting Mount McKinley Park, who were usually anxious to buy furs.

Mr. Stubbs discussed the location with the then superintendent of the Park, H. P. Karstens, and Mr. Karstens

encouraged him and assisted him in deciding upon a particular site. The place selected was six miles east of the eastern boundary line of Mount McKinley Park as the Park was then bounded. The site taken was subsequently restricted to 35 acres and acquired from the United States as a fur farming and trading post at a price of $2.50 per acre. It adjoined the Alaska Railroad right of way on the west.

3. Plaintiffs commenced building on the site in 1924, a house to live in, barns, pens, and other buildings, and moved thereto their breeding stock, consisting of four pairs of silver foxes, and equipment.

The building and arrangement of the farm or ranch required special consideration, and had to be adapted to the fixed natural habits and instincts of the silver fox. None of the buildings were pretentious in size or material, but the pens especially had to be carefully laid out and constructed and required peculiar treatment.

Plaintiffs' aim was first to raise about 37 pairs of silver breeding foxes. There is a difference between a breeding fox, in the fur farm industry, and a pelting fox. For breeding the female selected is short and wide, and the breeding animals, fox and vixen, are fed a different diet from pelting animals. The desired pelting animal is long and thin, wild, and the endeavor is to produce a fur that is glossy, of marketable color, and otherwise suitable to market demands. The diet for a breeding fox will not produce a marketable pelt. The pelts are usually prime in December or the early part of the year. There is no market for pelts that are not prime.

A silver breeding fox has to be kept quiet, free from noises, away from strangers or dogs, especially from any of its natural enemies. The silver fox especially is a shy animal and if disturbed will not breed in captivity. At mating time the foxes must be kept secluded and not disturbed even by feeding, and the caretakers endeavor to prevent any change in surroundings that might surprise or startle them, such as difference in wearing apparel. A watchtower, or place of observation, is used to oversee the foxes at mating time and forestall any disturbance. A twenty-four-hour watch is at times necessary. When the

observer discovers that mating is about to take place none of the pens are approached for any purpose.

Extreme care must also be exercised at whelping time, and if the vixen is frightened before the natural time for her delivery, the fright will often result in miscarriage.

The food for the foxes is selected with nicety, and adapted to whether they are fox or vixen, breeding or pelting, about to whelp, or suckling their young, and the pups are also given their own special diet. In addition to small wild animals, hunted locally and freshly killed, such as rabbits, parka squirrels, porcupines, an extensive menu was fed by plaintiffs made up from time to time as follows: tomatoes, carrots, lettuce, oranges, eggs, goat's milk, evaporated milk, cod liver oil, yeast, bone meal, fish meal, beef liver, beef hearts, semidry buttermilk, rolled oats, lard, tallow, shredded wheat, cream of wheat, raisins, wheat bran, corn meal, oil meal, soy bean meal, wheat hearts, alfalfa meal, iodized salt, licking salt, cornoil cake meal, tripe, apples, fox meal, fresh fish, trout, dried salmon, blueberries, strawberries. The average cost per day of the food for their breeding foxes was 25 cents for each fox.

By the early Spring of 1933, and before the plaintiffs closed their farm, as hereinafter described, the Stubbs were engaged in the production of silver breeding foxes only, and had acquired, through careful breeding and selection, a herd of seventy-three silver foxes, of prolific strain, suitable for breeding purposes, forty-four of which were proven breeders, proven breeders being much more valuable than unproven stock. They were at the point where they were about to raise foxes for pelting, which they expected to do by appropriate mating.

Besides the buildings and equipment for the raising of breeding stock plaintiffs had in storage material for buildings and equipment to be used for raising pelting foxes, and were prepared to go ahead with that part of their business.

4. In addition to their fox farm, Duke E. Stubbs had acquired by purchase in or prior to 1927 what was known as the Canyon Road House. The Canyon Road House consisted of a dwelling house, stable, ice house, meat cache, dog houses, and outhouses, surrounded by about 25 acres,

and was located on the west bank of the Nenana River, between the river and the Alaska Railroad, north of the northern boundary of Mount McKinley National Park, and not thereafter included within the limits of the park as extended. Mr. Stubbs used this road house as a hunting lodge when in search of wild animals as feed for the foxes. At such times he would often sleep in the lodge, his trips being a week or two apart, varying with the needs of the ranch. It was furnished with stove, bed, dishes, grub, an improvised work bench, crosscut saw, and a few other things.

It was rented at times during the year to trappers and hunters and plaintiffs derived a revenue of some $100 annually from this source.

5. Plaintiffs also had a store on their ranch, apart from their other buildings and so situated that customers would not get near enough to the pens to disturb the foxes. The store was not kept regularly open, but it was opened and sales made when a prospective customer by telephone or otherwise indicated a desire to do business. Groceries, clothing, hardware, guns, ammunition, and general merchandise were sold at the store. No reliable books of account were kept of the business done at this trading post. Its average estimated earnings were $1,800 a year. Its actual earnings are not proved. It was of advantage to the plaintiffs in connection with their fox ranch in that it enabled them to get supplies at wholesale prices and provided revenue for the upkeep of the ranch.

6. Plaintiffs also owned 1.71 acres with improvements thereon, purchased in 1927, adjoining the ranch which were let at a total annual rental of $160.

7. Plaintiffs also had individual incomes from other sources. Mrs. Stubbs made about $100 a year from sewing, dressmaking, making of tents, and parkas, she having the only sewing-machine in the settlement. Mr. Stubbs was a notary and did considerable business as such, receiving therefor an estimated income of $650 annually. Plaintiffs exhibited fox pups at the Agricultural Fair at Fairbanks and took first prizes therefor for three years, at $30 for each year. There were other and occasional indefinite re-

munerative services performed by plaintiffs, none of which amounted to regular employment.

8. Substantially all income, from whatever source, was invested by the plaintiffs in their fox farm, or reinvested in their trading post, relatively little being used for personal expenses. In general plaintiffs exercised a rigid economy, especially as regards their own persons, setting aside for the conduct of their fox ranch all the money they could earn beyond that necessary for their own upkeep.

9. The Act of Congress enlarging Mount McKinley Park was approved March 19, 1932, Public, No. 63, 72d Congress, H. R. 6485. Up to that time plaintiffs had made a capital investment in their fox ranch of at least $14,600 for location of site, erection of buildings, purchase of stock, tools, and equipment. Their personal services in the period during which they accumulated and perfected their breeding stock were reasonably worth a large sum which can not be exactly estimated. There was no definite market value of foxes in the vicinity of plaintiffs' farm and their shipment occasioned not only expense but difficulty. Upon all of the evidence, the court finds that the fair value of plaintiffs' foxes at the time when the acts complained of occurred was at least $40,000.00.

10. After passage of the Act of March 19, 1932, plaintiffs' 35-acre ranch and the adjoining acreage of 1.71 acres were surrounded by the Alaska Railroad right of way and the enlargement of the Park. Access to the ranch thereafter and to the adjoining 1.71 acres, a total of 36.71 acres, was to be had only through the Park or through the railroad right of way, and defendant's officers enforced against the plaintiffs, in plaintiffs' ingress to and egress from their ranch through the Park, the rules and regulations of the National Park Service with respect to persons and their property within the confines of Mount McKinley National Park.

In the Summer of 1932 Duke E. Stubbs sought permission from the Superintendent of the Mount McKinley National Park to bring in to his fox farm small animals killed outside of the Park for food for his foxes, which permission was refused by the Superintendent of the Park.

The Superintendent of the Park, in addition to preventing plaintiffs' unrestricted access to their premises through the Park, attempted further to limit their access by inducing the General Manager of the Alaska Railroad to issue a general circular September 26, 1932, and send the same to the plaintiffs, reading as follows:

> The boundary of the Mount McKinley National Park has by an act of Congress been extended southward on The Alaska Railroad to Windy Creek, and northward on Alaska Railroad to the center of the passing track at Moody.
>
> Your attention is therefore called to the National Park Rules and Regulations which prohibit any one from killing game of any description within the Park boundary, also prohibit any one from bringing wild game into the Park without prior written permission from the Park Superintendent.
>
> These regulations govern and apply to all of the land occupied and known as Alaska Railroad land between the above-mentioned points, and all concerned are enjoined to comply with the above regulations.

The Alaska Railroad right of way was not in fact embraced in the limits of Mount McKinley National Park, nor was it at any time part thereof.

11. Upon passage of the Act of Congress approved March 19, 1932, the officers of defendant's National Park Service stationed at Mount McKinley National Park gave verbal notice to settlers surrounded by the newly added area to leave their premises and go elsewhere. Plaintiffs' tenants on the 1.71 acres were thus induced by the Park officers to leave and the plaintiffs were in consequence deprived of any rental therefrom.

12. In or about September 1932 the officers of the National Park Service stationed at Mount McKinley National Park took possession of the Canyon Road House and buildings appertaining thereto, and occupied them and used them for Park purposes, knowing that plaintiff Duke E. Stubbs claimed title thereto, and without his consent, and against his protests.

During their occupation these officers materially damaged the road house proper, principally by removing therefrom a structural part of the roof, confiscated furniture and

equipment therein and on the premises, and removed and carried off the barn door, by such acts destroying the rental value of the premises after December 1932, and its former availability as a hunting lodge. There is no satisfactory proof of the amount of loss or damage beyond annual rental.

13. Pursuant to their endeavor to cause settlers surrounded by the Park area to vacate, the officers stationed at the Park, upon passage of the Act of March 19, 1932, passed and repassed through plaintiffs' ranch without their consent and against their objections. In so doing the officers were enroute to and from their official duties, brought with them dogs and horses belonging to the National Park Service, and passed so close to plaintiffs' fox pens as to prevent all mating. The route the officers took, viz, through plaintiffs' ranch and in proximity to the fox pens, was unnecessary and in lieu of other feasible routes that would have avoided plaintiffs' ranch. At the time of this trespass the officers knew that it would damage or destroy plaintiffs' business of raising silver foxes. No acts of trespass were committed by them prior to March 19, 1932.

14. It was not feasible to move the fur fox farm to another site outside the limits of the Park. As a direct result of the trespass by defendant's officers none of the foxes thereafter mated or vixens whelped and plaintiffs were thereby compelled to abandon and did abandon the business of raising foxes. Due to prohibition against the carrying of unsealed firearms and against hunting within the confines of the new park area plaintiffs were for practical purposes unable after extension of the park to provide a proper diet for their foxes.

Plaintiffs made reasonable efforts to sell their breeding stock, but, due to difficulties of transportation and communication, and long distances to possible markets, they were unable to do so.

After exhausting all reasonable efforts to continue, plaintiffs, in May or June of 1933, were forced by the circumstances recited to kill their stock. At the time the stock was thus disposed of their pelts were not in prime and

plaintiffs were unable to obtain more than $300 for what they could sell.

15. Due to the exodus of settlers from Mount McKinley National Park as aforesaid, plaintiffs no longer had a profitable custom for their store and they were thereby compelled to abandon that business also. Value of the stock on hand at time of abandonment is not proved.

The departure of settlers left them practically without a livelihood in the locality and they departed therefrom in 1933.

16. The stock, material, portable buildings, and equipment on the ranch were not removable to another location without unreasonable expense, were adapted to one purpose only, and their salvage value was negligible.

17. From all of the facts and circumstances shown by the evidence, the court finds that the loss or damage directly resulting to the plaintiffs from the matters set forth in the act of Congress is $50,000, after allowing credit for the amount of pelts sold.

The court decided that the plaintiffs were entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiffs seek to recover $130,742.25 under a special act of Congress. An examination of the act shows that its terms are very broad and sweeping and that Congress intended to give the plaintiffs the right to recover any loss or damage arising out of the extension of the limits of Mount McKinley National Park by an act of Congress not only in the silver fox and trading post businesses but also in any other business or occupation together with any loss or damage sustained by virtue of any acts of any officers or employees of the United States in connection with such extension.

The evidence leaves no doubt that the plaintiffs sustained heavy losses and damages as a result of the extension of the limits of Mount McKinley Park which were unavoidable and also sustained very considerable loss and damage by reason of unwarranted or unnecessary acts of the defendant's officers or employees in connection with this extension.

Most of the acts complained of are such that ordinarily would afford no basis for a cause of action and some of the acts, especially those of the officers or employees of the Government, were in the nature of torts, but any objection that might arise on account of their nature is precluded by the act of Congress under which the case comes before us. While, as we have said above, there is no doubt that plaintiffs sustained heavy damages, there is little direct evidence upon which the court can base a conclusion as to the amount thereof. A large portion of the evidence is indirect and indefinite by reason of which we are unable to determine just how much damage plaintiffs sustained, but we are able to make a finding in the nature of a jury verdict that plaintiffs at least sustained a certain sum beyond which is merely conjecture, although it may be that plaintiffs' actual damages are somewhat larger.

As an example of the nature of much of the evidence, we might cite the fact that the testimony shows that plaintiffs had invested at least $14,600 for location of site, erection of buildings, purchase of stock, tools, and equipment. All this was lost as a result of the extension of the Park limits, but the mere fact that this property cost the plaintiffs that sum is not sufficient to show that they sustained that amount of loss. It is, however, a circumstance that bears upon the question of the value of this property.

It should be further said that practically all the testimony with reference to value of the animals was given by one of the plaintiffs who was undoubtedly highly skilled in the business of raising silver foxes, as evidenced by the premiums he had taken, his studies, and his long experience. His testimony on this subject is in the nature of opinion evidence given by an expert and the court is not bound thereby but may take into consideration any other evidence in the case that bears on the question of value. The testimony on behalf of plaintiffs also showed that the value of their personal services during the time they were accumulating and perfecting their breeding stock was $54,000, but the larger portion of this must have gone into the value of the foxes and have been merged therein and some of it into living

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expenses. The same is true with reference to their expenditures for feeding and breeding the foxes, which the testimony showed amounted to a large sum. Silver foxes differ much in value according to the fur produced, their breeding qualities, and other matters. The special skill of the plaintiff evidenced, as stated above, enabled him to develop a herd of foxes worth much more than the average of such animals which was especially valuable for breeding purposes.

The plaintiffs' cause of action as set out in the petition contains some items of loss or damage which are only indirectly the result of the extension of the Park limits, and we do not think it was the intention of Congress that there should be any recovery therefor. From all the facts and circumstances bearing on the matters which under the act may form a basis of recovery we have concluded that the loss and damage sustained by plaintiffs, less the amount received for pelts after the business of plaintiffs was discontinued, is $50,000 and judgment will be entered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM R. SIMA v. THE UNITED STATES

[No. 43393. Decided December 6, 1937]

On the Proofs

Pay of Naval Academy band leader.—Where enlisted man was designated as leader of the Naval Academy Band, under the Act of February 14, 1931, which provided that such leader should receive the pay and allowances of a lieutenant, he is not entitled to the benefits of the Act of June 7, 1935.

Same.—Act of June 7, 1935, applies only to "present" leaders of the United States Navy band and band of United States Marine Corps and their successors are not entitled to similar relief. *Nolan* v. *U. S.*, 70 C. Cls. 357.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. On January 16, 1933, William R. Sima, the plaintiff, was designated as leader of the Naval Academy Band. His letter of appointment reads as follows:

> 1. The Act of February 14, 1931, Pub. 663, 71st Congress, has allowed the leader of the Naval Academy Band the pay and allowance of a lieutenant, senior grade, U. S. Navy, from the date of approval thereof.
> 2. Pursuant thereto, you, William Richard Sima, are designated as leader of the Naval Academy Band.
> 3. This designation is effective from January 12, 1933, and continues in effect until revoked by the Chief of the Bureau of Navigation.

Said designation has not been revoked, and the plaintiff has performed the duties of leader in the United States Naval Academy Band, continuously, since January 12, 1933.

2. On January 16, 1933, plaintiff had to his credit, 22 years, 4 months, and 8 days of enlisted service.

3. A lieutenant, with over 17 years of service, is entitled to the pay of the fourth period. During the period between January 12, 1933, and September 30, 1933, plaintiff was paid the pay and allowance of the fourth period. As a result of a decision of the Comptroller General, plaintiff was required to refund $817.67, representing the difference between the third and fourth pay periods, for the period between January 12, 1933, and September 30, 1933. Since September 30, 1933, he has received the pay and allowances of the third period, which are payable to a lieutenant, junior grade, with over 10 years of service.

4. During the time plaintiff has served as leader of the Naval Academy Band, he has had dependent upon him a wife, with whom he has continuously resided.

5. Should plaintiff be entitled to the pay and allowances of a lieutenant, senior grade, with a dependent, from Janu-

ary 12, 1933 (including the $817.67 paid to him from January 12, 1933, to September 30, 1933, which was subsequently refunded), there was due him on August 17, 1936, the sum of $4,343.46. This is a continuing claim.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff was appointed leader of the United States Naval Academy Band on January 16, 1933, effective from January 12, 1933, and since that date has continuously performed the duties of leader of such band. On the date of his appointment plaintiff was an enlisted man in the United States Navy and had to his credit 22 years, 4 months, and 8 days' enlisted service. The appointment was made pursuant to the act of February 14, 1931, 46 Stat. 1111, which provides:

> That the Naval Academy Band shall hereafter consist of one leader with the pay and allowances of a lieutenant, senior grade, United States Navy; one second leader, with the pay and allowances of a warrant officer; and of such enlisted men and in such ratings as may be assigned to that band by the Navy Department: *Provided*, That the ratings and the proportionate distribution among the ratings of the enlisted men shall be substantially the same as in the Navy Band: *Provided further*, That the leader, second leader, and the enlisted men of the Naval Academy Band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are or hereafter may become applicable to other officers and enlisted men of the Navy.

It is conceded in the argument that the words "senior grade" as applied to a lieutenant of the Navy are superfluous, as the pay statutes recognize only lieutenants, junior grade, and lieutenants in the Navy. The effect of the Act was to give to the leader of the Naval Academy Band the same relative rank for pay purposes as that given to leaders of the Marine Band and the Navy Band in sections 11 and 17, respectively, of the act of March 4, 1925, 43 Stat. 1269.

Opinion of the Court

The pay periods and the pay of a lieutenant of the Navy are fixed by the Adjusted Service Pay Act of June 10, 1922 (42 Stat. 625–627), as follows:

> That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general, of the Navy below the grade of rear admiral, * * * pay periods are prescribed, and the base pay for each is fixed as follows: * * *; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; * * *
>
> * * * * *
>
> The pay of the fourth period shall be paid to * * * lieutenants of the Navy * * * who have completed seventeen years' service * * *.
>
> The pay of the third period shall be paid to * * * lieutenants of the Navy * * * who have completed seven years' service * * *.
>
> The pay of the second period shall be paid to * * * lieutenants of the Navy * * * who are not entitled to the pay of the third or fourth period; * * *.

The plaintiff has received the base pay and allowances of the third pay period. He seeks in this suit to recover the difference between the pay and allowances he has received and the pay and allowances of the fourth pay period.

It appears that a lieutenant of the Navy may receive the base pay of the second, third, or fourth period, depending entirely upon the number of years' service he has completed—the pay of the fourth period after completion of 17 years' service, the pay of the third period after 7 years' service, and the pay of the second period to lieutenants who are not entitled to the pay of either the third or fourth period. The plaintiff's contention is that he, having completed more than 17 years' service at the time of his designation as leader of the Naval Academy Band, became entitled to the pay of a lieutenant of the Navy with a like service, which is the pay of the fourth period. The contention overlooks entirely paragraph 11 of section 1 of the pay act of June 10, 1922, *supra*, which provides:

> For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service * * *.

The plaintiff was an enlisted man at the time of his appointment as leader of the Naval Academy Band and had no commissioned service to his credit, nor has he any commissioned service to his credit to this date. Plaintiff, therefore, even if he held the rank of lieutenant in the Navy, which he does not, being still an enlisted man, could not satisfy the requirements of the statute for the pay of the fourth pay period. Neither could he satisfy the requirements of the statute for the pay of the third pay period. Since, however, the rank of lieutenant corresponds to the rank of captain in the Army, plaintiff, under paragraph 12 of section 1 of the act of June 10, 1922, would, by assimilation, be entitled to receive the pay of the third pay period.

The question here presented was considered and determined by the court in *Benter* v. *United States*, 79 C. Cls. 726, 729. The plaintiff in that case was an enlisted man in the Navy who had an enlisted service of more than 17 years, when, on April 8, 1925, he was designated as leader of the United States Navy Band. He was appointed under the act of March 4, 1925, 43 Stat. 1275, which provided:

> SEC. 17. That hereafter the band now stationed at the navy yard, Washington, District of Columbia, and known as the Navy Yard Band, shall be designated as the United States Navy Band, and the leader of this band shall receive the pay and allowances of a lieutenant in the Navy: *Provided*, That all service as an enlisted man in the naval service shall be counted in computing longevity increases for pay of this leader. * * *

Benter, like the plaintiff in this case, was receiving the pay of the third pay period and claimed that because he had to his credit a service of more than 17 years he was entitled to the pay and allowances of the fourth pay period. The court held that because the service relied on was enlisted service and not commissioned service *Benter* was not entitled to recover. The plaintiff does not challenge the correctness of the *Benter* decision but contends the effect of that decision has been overcome by a subsequent act of Congress of June 7, 1935, 49 Stat. 331. This Act provided that after the date of its approval "the

present leader of the United States Navy Band and the present leader of the band of the United States Marine Corps shall have the rank, pay, and allowances of a lieutenant in the Navy and of a captain in the Marine Corps, respectively; and in the computation of their pay and allowances all service in the Navy and Marine Corps of whatever nature rendered by said leaders shall be counted as if it were commissioned service * * *." The plaintiff contends that since the act of February 14, 1931, under which he was appointed, contained the provision "that the leader, second leader, and enlisted men of the Naval Academy Band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service *as are or hereafter may become applicable* to other officers and enlisted men of the Navy" (Italics ours), he is entitled to the benefits granted to the leaders of the United States Navy Band and the United States Marine Band by the act of June 7, 1935. It is contended that since Congress has passed legislation applying to the leaders of the Navy Band and the Marine Band, whose positions are identical to that of plaintiff, the plaintiff is entitled to the same benefits of such legislation as are the persons specifically named therein.

The act of June 7, 1935, was a relief statute entitled "An Act for the relief of the present leaders of the United States Navy Band and the band of the United States Marine Corps." The leader of the Naval Academy Band was not named either in the title or the body of the Act. It has been held by this court that where Congress legislates for the relief of individuals only persons specifically named are entitled to the relief and the same can not be extended to others not named. *Nolan* v. *United States*, 70 C. Cls. 357.

It is significant that the act of June 7, 1935, granted relief only to the "present" leaders of the bands mentioned. Since the successors of the "present" band leaders would not be entitled to similar relief, the legislation is not such as was contemplated by the provisions of the act of February 14, 1931, wherein the Naval Academy Band members were to be "entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and

length of service as are or hereafter may become applicable to other officers and enlisted men of the Navy."

Plaintiff is not entitled to recover and the petition is accordingly dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GARFIELD CHARLES v. THE UNITED STATES

[No. 43420. Decided December 6, 1937. Plaintiff's motion for new trial overruled March 7, 1938]

On the Proofs

Income tax; compensation of referee in bankruptcy.—A referee in bankruptcy, not being a judge of a "constitutional court," his compensation, which is indefinite, is subject to income tax. *Williams* v. *U. S.*, 289 U. S. 553; *O'Donoghue* v. *U. S.*, 289 U. S. 516. *Evans* v. *Gore*, 253 U. S. 245 distinguished.

The Reporter's statement of the case:

Mr. Louis Cohen for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

Plaintiff was appointed a referee in bankruptcy in December 1926 and served continuously in such capacity by successive appointments up to and including the year 1933. During the calendar years 1931, 1932, and 1933, the plaintiff performed the prescribed duties of a referee in administering bankrupt estates. In March 1932 the plaintiff filed his income tax return for the year 1931 and in this return listed compensation received by him as a referee in bankruptcy in the sum of $37,656.43 subject to deductions (not in dispute) in the amount of $10,249.47, leaving net taxable income as reported in the sum of $27,406.96. Upon the filing of this return the Commissioner of Internal Revenue

levied an assessment thereon against the plaintiff in the sum of $1,127.95 which was paid in installments as follows:

March 15, 1932	$282.00
June 10, 1932	282.00
September 14, 1932	282.00
December 15, 1932	281.95
Total	1,127.95

In March 1933 plaintiff filed his income tax return for the taxable year 1932 and listed therein compensation received by him as referee in bankruptcy in the sum of $36,567.68 with deductions (not in dispute) aggregating $3,763.36 leaving net taxable income in the sum of $32,804.32. Upon the filing of this return the Commissioner of Internal Revenue levied an assessment thereon against the plaintiff in the sum of $3,943.00 which was paid in installments as follows:

March 15, 1933	$985.75
June 15, 1933	985.75
September 13, 1933	985.75
December 15, 1933	985.75
Total	3,943.00

In March 1934 plaintiff filed his income tax return for the taxable year 1933 and listed therein compensation received by him as referee in bankruptcy in the sum of $43,909.98 and other income (not in dispute) of $3,739.84 totalling $47,649.82 with deductions (not in dispute) aggregating $239.30, leaving net taxable income in the sum of $47,410.52. Upon the filing of this return the Commissioner of Internal Revenue levied an assessment thereon against the plaintiff in the sum of $7,921.06 which was paid in installments as follows:

March 15, 1934	$2,000.00
June 15, 1934	2,000.00
September 10, 1934	2,000.00
December 10, 1934	1,921.06
Total	7,921.06

On March 15, 1935, plaintiff filed claims for refund for the following years and in the amounts set opposite:

1931	$1,127.95
1932	3,943.00
1933	7,921.06

being the amount of tax paid, as stated above, and as grounds for such claims for refund plaintiff alleged in substance in the respective claims his appointment as referee in bankruptcy, that the taxes sought to be refunded were assessed upon income which consisted solely of compensation received by him as such referee in accordance with law, and that his income as a judicial officer was not subject to diminution by taxation under the Constitution of the United States.

These claims were disallowed by the Commissioner.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The question to be determined in this case is whether the income of a referee in bankruptcy arising out of fees paid to him for services in that capacity is subject to an income tax. The plaintiff contends that he is a judicial officer and that the provision of the Constitution with reference to judges providing that their compensation shall not be diminished during their continuance in office renders illegal any tax imposed upon his compensation.

Conceding for the purpose of the argument that the taxation of plaintiff's compensation operates to diminish it, we do not think that he was one of the judges of the "inferior courts" whose compensation can not under the Constitution be "diminished during their continuance in office." It is true that a referee in bankruptcy performs many judicial functions and in some respects acts as a judge but, as said in *Weidhorn* v. *Levy*, 253 U. S. 268, 271:

> These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference— * * *.

It is well settled that the mere performance of judicial duties is not a test of whether the officer is one whose compensation can not be diminished under the provisions of the Constitution. See *Williams* v. *United States*, 289 U. S. 553; *O'Donoghue* v. *United States*, 289 U. S. 516. The plaintiff was not a judge of a court in the ordinary sense of the word

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and there are other matters which, we think, make it clear that it was not intended that the constitutional provision should be applied to his office. The plaintiff was not appointed for life but only for a short term. The compensation of a referee in bankruptcy is indefinite and based on the value of the funds coming into the jurisdiction of the bankruptcy court. The tax does not take away what has been given by the Government and in that respect is not similar to the tax considered in *Evans* v. *Gore*, 253 U. S. 245. Moreover, the Supreme Court has held in *Williams* v. *United States*, *supra*, that the provision of the Constitution now being considered applies only to what are termed judges of a "constitutional court" and without quoting from the decision in that case it is quite evident from what is said therein the office which plaintiff filled is not that of a judge of a constitutional court.

The prohibition against diminution of compensation was designed to provide an independent judiciary and for that purpose was coupled with life tenure, otherwise it would be of little effect. We are clear that it was not intended to apply to referees in bankruptcy. What we have said above makes it unnecessary to consider the other questions raised in the case.

The petition of plaintiff must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

LAMM LUMBER COMPANY v. THE UNITED STATES

[No. K-533. Decided January 12, 1938. Motion for new trial overruled May 2, 1938]

On the Proofs

Contract for purchase of timber on Indian Reservation.—Evidence held insufficient to sustain claim for damage on account of land patent issued by government.

Reporter's Statement of the Case

Same; tribal contract; increase in price.—Where tribal contract provided in substance that any advance in stumpage rates to be paid by plaintiff should not exceed fifty per cent of the increase in average mill run wholesale net value of lumber at mills, during the three years preceding, and evidence shows there was no such increase in mill prices, an increase in stumpage prices under the contract was without authority. *See Forest Lumber Co.* v. *U. S.*, herein, p. 188.

Same; liability of the Government under tribal contract.—Where contract recited it was made by the Superintendent of the Klamath Indian School, for and on behalf of the tribe, and purchaser agreed to make payment to said Superintendent "for the use and benefit" of the tribe, said Superintendent was acting, by authority of law, for the government; and the government, in what it did, was acting under its own rights and powers, and not as agent; where one executes a contract solely under his own powers and rights he becomes liable thereon although the instrument specifies that it is executed in behalf of and for the benefit of a third party.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Lamm Lumber Company, plaintiff, is a corporation organized under the laws of the State of Oregon, with its principal office and place of business at Modoc Point, Oregon.

2. In March 1917, the Assistant Secretary of the Interior advertised for sale about 160,000,000 feet of timber (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir upon about 11,500 acres within township 33 south, range 7 east, on what is designated as Southern Mount Scott Unit, within the Klamath Indian Reservation, Klamath, Oregon.

3. Plaintiff in response to this advertisement bid on the property offered for sale and its bid was accepted. On June 27, 1917, a contract was signed by plaintiff and later approved by the Assistant Secretary of the Interior. The contract stated that it was made by the Superintendent of the Klamath Indian School "for and on behalf of the Klamath

Indians, party of the first part," by the terms of which the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." This contract is attached to the petition as Exhibit "A" and made a part hereof by reference.

Under the contract, the party of the first part agreed to sell to the party of the second part all merchantable dead timber standing or fallen, and all live timber marked or designated for cutting by officers of the Indian Service, estimated to be about 160,000,000 feet board measure, log scale of pine timber (about 95% yellow pine and 5% sugar pine), and about 10,000,000 feet of white fir, located upon an area of about 11,500 acres of land, designated as the Southern Mount Scott Unit within the Klamath Indian Reservation.

Under the contract, the party of the second part agreed to pay to the superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the timber to be cut at fixed rates per M feet board measure, Scribner Decimal C scale. The contract prescribed the rates for specified periods of the contract and with reference to changes in the rates provided:

> It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices are fixed.

Among other things, the contract also provided:

> 2. The sale includes an area of approximately 11,500 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows: [Here followed a description of the boundaries as to which there is no dispute in the case.]
>
> The sale area includes 23 allotments comprising approximately 3,600 acres as to which the purchaser agrees to enter into separate contracts with the Indians who

desire to sell and to pay to such Indians 10 per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted land.

3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twelve million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twelve million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

4. The timber will be paid for in advance payments of not less than $10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than $2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

* * * * *

27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

* * * * *

30. As a further guarantee of a faithful performance of this contract the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of thirty thousand dollars ($30,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder.

This bond was furnished and made to the United States in accordance with the above agreement.

4. Pursuant to the provisions of article 2 of the contract of June 27, 1917 (finding 3), plaintiff, on June 24, 1918, entered into a contract with John Cole, father and natural guardian of John W. Cole, minor, an Indian under the jurisdiction of the superintendent of the Klamath Indian School. Under the contract, John Cole agreed to sell to plaintiff all merchantable timber properly marked for cutting, which was estimated to be about 2,000,000 feet of pine, and a small amount of white fir, then situate on the NE¼, Sec. 30, Twp. 33 S., R. 7 E., and within the limits of the Klamath Indian Reservation. The contract further provided that plaintiff should pay to the superintendent of the Klamath Indian School an estimated sum of $6,500 for the period ending March 31, 1920. It also provided that for the three-year periods beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, plaintiff should pay such prices as should be fixed by the Commissioner of Indian Affairs, in the manner prescribed in the contract of June 27, 1917 (finding 3). On July 18, 1918, this contract was approved by the Acting Commissioner of Indian Affairs, and on August 31, 1918, $650 was paid to the Superintendent of the Klamath Indian Agency as an advance payment thereunder. The contract was recorded in Klamath County, Oregon, on January 17, 1921.

5. On March 2, 1919, John W. Cole died. Conformably with the requirements of the Act of June 25, 1910 (36 Stat. 855), and the Regulations of the Department, the Assistant Secretary of the Interior, on August 18, 1920, determined that John Cole, father of the deceased Indian allottee, John W. Cole, was his sole heir. On November 19, 1920, the United States, through the General Land Office, issued to John Cole a fee simple patent covering the land theretofore patented to John W. Cole, deceased. On March 26, 1921, John Cole and his wife deeded the land theretofore patented to him to Luke E. Walker. This deed was recorded in Klamath County, State of Oregon, on March 26, 1921. No question arose between the plaintiff and Luke E. Walker respecting the cutting of timber under the allotment contract

of June 24, 1918, until some time in 1925, in which year Walker set up a claim of superior title and right to the timber thereon.

6. In June 1926, Walker commenced suit against the plaintiff in the Circuit Court of Klamath County, Oregon. The petition was in two counts, the first count being based on an allegation that the plaintiff had unlawfully entered upon the NE¼ of Sec. 29, Twp. 33, R. 7 E. W. M., and cut and carried away timber therefrom to the value of $74.83, damaged the premises in the sum of $500, and claimed treble damages by reason of such acts. The petition also set up a claim on account of trespass in establishing and using a logging road over the premises above described for which damages were asked in the sum of $500 in one item and $300 in another. Damages of $500 were also asked because of the manner in which trees were cut upon adjoining premises, allowing tops and debris therefrom to be cast on this property.

In a second count the petition asked damages in the sum of $413.84 for timber and ties cut and carried away from the NE¼ of Sec. 30, Twp. 33 South, R. 7 E. W. M., and $1,000 for the trespass in so doing and claimed treble damages. The second count also set up a claim for constructing a logging railroad over the premises and the trespass in using the same in the sum of $500. The petition likewise contained a general plea for recovery of $1,800 as costs and disbursements in the suit. The total amount of the items of both counts of the petition and the general allegation was $5,588.67, the amount claimed on the second count being somewhat larger than stated in the first.

In its answer to the second count of Walker's suit the plaintiff set out the facts with reference to the contract which had been made with John Cole as hereinabove recited and alleged that a patent was erroneously issued by the defendant to John Cole, father of John W. Cole, and that John Cole gave a deed to Walker for the land described in the contract, to-wit, NE¼ of Sec. 30, Twp. 33, R. 7. Plaintiff further alleged that any rights acquired by Walker were inferior to those which plaintiff had acquired through its

contract with John Cole and that Walker had knowledge of plaintiff's rights before he received the deed from John Cole for the premises in controversy. The Superintendent of the Klamath Indian Reservation and the Commissioner of Indian Affairs were informed of the commencement of this suit and the progress of litigation therein, but the Government did not appear or take any part in the action.

7. On June 18, 1928, a consent judgment was entered in the Circuit Court of Klamath County, Oregon, against the plaintiff in the sum of $15,000. The judgment recited that it was for the acts alleged and complained of in the complaint in the case and for the removal of timber by the defendant therein cut on the two tracts, namely, NE¼ of Sec. 29, Twp. 33 S., R. 7 E. W. M., and NE¼ of Sec. 30, Twp. 33 S., R. 7 E. W. M.

The judgment entered in the suit begun by Walker was subsequently paid by plaintiff and about the same time as a part of the settlement Walker deeded to plaintiff the realty which had been conveyed to him by John Cole and assigned to plaintiff all his interest and title in the proceeds of the timber upon the Cole allotment paid or to be paid by the plaintiff to the Superintendent of the Klamath Reservation. In the meantime, the Superintendent of the Klamath Reservation had been paid the sum of $12,869.31 for timber cut by plaintiff on the John W. Cole allotment.

8. Shortly after the entry of judgment referred to in the preceding finding, the plaintiff petitioned the Commissioner of Indian Affairs to reimburse it for the damage and loss sustained by it on account of the act of the United States in issuing to John Cole a fee simple patent to the land covered by the timber contract executed between the plaintiff and John Cole on June 24, 1918, as hereinabove recited. This petition asserted in substance that after the issuance of the patent plaintiff had no alternative than to effect the best settlement possible with Luke E. Walker and it asked to be paid the difference between the sum of $15,000 paid to Walker and whatever amount might be repaid to it by the Commissioner of Indian Affairs.

The Commissioner of Indian Affairs denied this request but advised the plaintiff that it was entitled to the proceeds

from the sale of the John Cole allotment timber in the hands of the Superintendent of the Klamath Agency less 8% to reimburse the United States for administrative costs.

On August 27, 1928, the Superintendent of the Klamath Indian Agency refunded to plaintiff $11,189.77 out of the price of the timber cut on the John W. Cole allotment under contract with plaintiff. This did not include the sum of $650 paid as an advance payment by the Lamm Lumber Company and deposited to the credit of the Indian minor, John W. Cole, deceased. The 8% deducted, amounting to $1,029.54, was retained by the United States to reimburse it for the expenses incident to administering the contract between the plaintiff and John Cole.

The difference between the sum repaid by the Superintendent of the Klamath Agency to the Lamm Lumber Company, namely, $11,189.77, and the sum of $15,000 paid by the Lamm Lumber Company to Walker in settlement of the judgment was $3,810.23. The plaintiff also incurred additional expenses in the way of an attorney's fee of $1,000 and miscellaneous expense aggregating $63.75 in effecting the compromise settlement of the suit filed against it by Walker. The difference between the sum repaid by the Superintendent to the Lamm Lumber Company and the total of plaintiff's expense as above recited was $4,873.98.

9. The timber contract attached to the petition provided for a set price from its inception up to April 1, 1920, and that for the three-year periods of the contract term beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, the price should be such as should be fixed by the Commissioner of Indian Affairs in the manner specified by the contract. (See Finding 3.) Increases were made for the periods beginning April 1, 1920, and April 1, 1923.

On December 22, 1925, plaintiff was advised that its contract provided for readjustment of stumpage prices effective April 1, 1926, and was asked to consent that the date of such price readjustment notice be extended to February 28, 1926. On January 7, 1926, plaintiff replied that this would be satisfactory, but on February 26, 1926, the Commissioner of Indian Affairs directed that the plaintiff be advised that

there would be no increase in stumpage prices on April 1, 1926; and on February 26, 1927, the Commissioner notified the plaintiff by telegram that the price of stumpage would not be increased on April 1, 1927. The matter continued to be the subject of correspondence between the parties during 1926 and 1927.

On January 20, 1928, the Commissioner of Indian Affairs wrote a letter to plaintiff in which he reviewed the price increases made effective in 1920 and 1923 and the facts which prompted the Department not to impose a price increase effective April 1, 1926, or April 1, 1927, but stated that on April 1, 1928, price increases which were specified would become effective and plaintiff was asked whether it would voluntarily agree to an increase of 56 cents per M feet in the price of yellow pine from the Southern Mount Scott Unit during the year beginning April 1, 1928, this increase being mentioned as a compromise and less than would be justified by the market.

On January 30, 1928, the Commissioner of Indian Affairs sent the following telegram to plaintiff:

> Please wire today whether you accept suggested compromise of 56 cent increased price Klamath timber.

To this plaintiff replied:

> We will not contest proposed increase of price if established by Department. Stop. However, we had expected hearing and would like same delayed until after last year's figures in and after bids received on present advertised unit. Stop. We believe Department idea of values will change.

On January 31, 1928, the Commissioner of Indian Affairs sent another telegram to plaintiff as follows:

> Your telegram thirtieth construed as request for waiver final notice of increased price Southern Mount Scott Unit until April first in order that figures to be presented by you may be considered.

On February 1, 1928, plaintiff wrote the Commissioner of Indian Affairs a letter in which was said:

> In our wire of January 30th we advised that we would not contest an increase in stumpage price up to 56 cents which you suggested, if the Department saw fit to make

such increase, but requested that your decision be deferred until after last year's figures and the bids on the newly advertised units were received.

It further stated that it understood from the telegram of January 31st that decision would be delayed until April 1st, and suggested that action be deferred until after April 10th, on which date bids would have been received on other units and the price change would then be made as of April 1st. To this letter the Commissioner of Indian Affairs replied on February 9, 1928, stating that it did not appear that bids to be received on other units of the Klamath Reservation should be considered in view of certain facts stated in the letter and that the office would advise plaintiff definitely prior to April 1, 1928, as to the increase to be made under plaintiff's contract.

On March 24, 1928, the Commissioner of Indian Affairs sent the following telegram to plaintiff:

> Decision reached increase price Southern Mount Scott Unit 40 cents effective April 1st. Can hear you as requested your attorney.

On April 1, 1928, plaintiff addressed telegrams to certain Senators in Washington, stating that the Commissioner of Indian Affairs had notified five Klamath operators that a stumpage price increase of 40 cents would be made effective April 1, 1928; that the market was in terrible shape and getting worse; that no rise on any unit was justified, because average for District last year did not show interest on investment; that the action was contrary to the terms of the contracts involved in its case and also in the case of the Algoma Lumber Company, and asked that the Senators intercede in behalf of all operators.

On April 2, 1928, a Senator forwarded to the Commissioner of Indian Affairs the telegram protesting the price increase made effective April 1, 1928, and after referring to a conversation with the Commissioner, expressed the hope that he would give careful attention to the matter with a view of preventing excessive stumpage prices.

In letters addressed to the Oregon Senators, on April 3, 1928, the Commissioner of Indian Affairs advised, in sub-

stance, that in view of the interest expressed he had again reviewed the matter and regretted to say that he was unable to reverse his conclusions but must adhere to the 40 cent increase.

On April 17, 1928, plaintiff sent a letter to the Commissioner of Indian Affairs stating at length the reasons why it considered the recent increase in the price of the timber unjustified and claiming that the Department had no right under the contract to increase the price until April 1, 1929, and should withdraw the increase of 40 cents per M feet. To this letter the Chief of the Forestry Section of the Bureau of Indian Affairs replied in a so-called memorandum dated April 18, 1928, analyzing the facts and statements set forth in plaintiff's letter of April 17, 1928, also stating facts in reply thereto, and asserting that telegrams and letters received from the plaintiff had definitely accepted the Department's suggested compromise of 56 cents [one-half of $1.12 which the Department had declared would not be unreasonable], that later the Department decided to increase the price only 40 cents, and that Mr. Lamm could not now insist on strictly following the wording of the contract.

From April 1, 1928, the date on which the challenged price increase was made effective, to April 30, 1929, the company scaled a total of 30,315,980 feet of pine timber. That quantity of timber at 40 cents a thousand feet board measure totals $12,126.39 which was paid by plaintiff upon demand of the Indian Commissioner.

The defendant introduced in evidence Exhibit R, a report in 102 pages, giving statistical information of stumpage rates and wholesale prices of lumber at each of the mills in the Klamath District for the years to which their several contracts applied together with other matters bearing thereon, all in detail. This exhibit was compiled by the Assistant Director of Forestry and the Assistant Forester. It shows that instead of there being any increase in the value of lumber at the mills over the average price for the three years preceding the date of the increase in price, there was a decrease of about $3 per M feet.

The court decided that the plaintiff was entitled to recover, under the tribal contract, the sum of $12,126.39.

GREEN, *Judge*, delivered the opinion of the court:

In June 1917 the plaintiff executed a written contract for the purchase of timber to be cut by it on the Klamath Indian Reservation. The contract stated that it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians" and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as "party of the first part" and stated that "the party of the first part agrees to sell to the said Lamm Lumber Company," on the conditions stated, certain timber upon a designated area and that the Lamm Lumber Company "agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians," the value of the timber at prices fixed in the manner prescribed by the contract. This contract, which is set out in full in Exhibit A attached to the petition, is referred to in argument as a "tribal" contract. This tribal contract also specified that the sale area included twenty-three allotments as to which the purchaser agreed to enter into separate contracts with the Indians who desired to sell for the purchase of timber on their allotted lands at prices fixed therefor.

The petition is in two counts. The first count alleges that pursuant to the provisions of the tribal contract plaintiff entered into a contract with John Cole, father of one John W. Cole, a minor, and an Indian under the jurisdiction of the Superintendent of the Klamath Indian school, by which John Cole agreed to sell to the plaintiff the timber upon certain land described in the contract which had been allotted to John W. Cole and plaintiff agreed to pay for said timber to the Superintendent of the Klamath Indian school in the manner set out in the contract; and on August 31, 1918, $650 was paid to the Superintendent of the Klamath Indian Agency as an advance payment under the contract. On March 2, 1919, John W. Cole died, and the Secretary of

the Interior having determined that his father, John Cole, was sole heir, the United States issued in November, 1920, to John Cole a fee simple patent for the land upon which the timber was located which had been sold to the plaintiff as above stated. On March 26, 1921, John Cole and his wife deeded this land to Luke E. Walker and in 1925 a controversy arose between Walker and the plaintiff respecting the right to cut timber on the Cole allotment. About June 1926 Walker commenced suit against the plaintiff to restrain the cutting of timber on the land which had been conveyed to him by John Cole and other land, demanding treble damages. Plaintiff filed an answer to the suit begun by Walker asserting superior title, but on June 18, 1928, a compromise having been effected, a consent judgment was entered against plaintiff in the sum of $15,000 in favor of Walker and about the same time as a part of the settlement Walker deeded to plaintiff the realty which had been conveyed to him by John Cole and assigned to plaintiff all his interest and title in the proceeds of the timber upon the Cole allotment paid or to be paid by the plaintiff to the Superintendent of the Klamath Reservation. In the meantime, the Superintendent of the Klamath Reservation had been paid the sum of $12,869.31 for timber cut by plaintiff on the John W. Cole allotment.

After the settlement of the suit begun by Walker, the Superintendent of the Klamath Indian Agency refunded to plaintiff the sum of $11,189.77, but deducted out of the total amount paid by plaintiff for the timber on the Cole allotment $650 paid as an advance payment by the plaintiff and $1,029.54, being 8 per cent of the total amount paid which was retained by the defendant to reimburse it for the expenses incident to administering the contract between the plaintiff and John Cole.

The first count of the petition is based on the allegation that plaintiff paid $15,000 in settlement of the suit brought against it by Walker under the circumstances above described, that it also paid an attorney's fee of $1,000 and miscellaneous expense aggregating $63.75 in effecting the compromise settlement of Walker's suit, making a total of expenditures in connection with its purchase of timber on

the Cole allotment of $1,663.75, and it seeks to recover the difference between the sum repaid by the Superintendent and its total amount of expense in connection with the suit by Walker as above recited. This difference is $4,873.98 for which sum plaintiff asks judgment.

When the claim set up in the first count of the petition is analyzed in connection with the facts stated therein, it will be seen that it is in the nature of a suit seeking to recover damages by reason of defendant having issued the patent to John Cole through whom Walker acquired title. The defendant sets up several defenses to this count none of which need to be considered unless the evidence establishes that the plaintiff was in fact damaged as a result of the patent having been issued to Cole in the manner above set forth.

It has already been shown that John Cole and his wife deeded this land to Luke E. Walker and thereafter Walker commenced a suit against the plaintiff seeking treble damages for the timber cut from this tract and another parcel of land and for trespass. In plaintiff's argument this suit seems to be treated as if it related solely to the land specified above, but the fact is that the petition in the suit of *Walker v. plaintiff* was in two counts and while both counts sought to recover treble damages for timber cut and trespass, the first count pertained to an altogether different tract of land from the parcel involved in this suit, and the cause of action set out therein had no connection whatever with the tract conveyed by patent to John Cole upon which Walker in the second count alleged the Lamm Lumber Company had unlawfully cut timber and trespassed. There was also a general allegation at the close of the petition claiming further damages in the sum of $1,800 independently of the two counts. The total amount of the items of both counts of the petition in the Walker suit and the general allegation was $5,588.67, the amount claimed on the second count being somewhat larger than stated in the first. The Lamm Lumber Company paid $15,000 in settlement of the suit begun by Walker and a consent decree was entered therein on June 18, 1928, reciting that the judgment was rendered for timber cut

on the two tracts, describing them separately, and as a determination of all liability of the defendant [Lamm Lumber Company] to the plaintiff [Walker] on account of the various matters recited in the complaint. A few days prior to the payment of the judgment Luke E. Walker deeded to plaintiff the realty theretofore conveyed to Walker by John Cole which was the same realty as was described in the timber contract between John Cole and the plaintiff. This conveyance was made part of the settlement of the suit.

There is no evidence whatever to show how much was paid on the respective counts or that there was any separation thereof in making the settlement. If we were to assume (as we think cannot be properly done) that in the settlement of the case payments were made upon each count in proportion to the amount claimed therein, the amount paid in relation to the timber tract involved will be several thousand dollars less than the sum which plaintiff agreed to pay for the timber thereon. As has been previously shown, the defendant refunded to the Lamm Lumber Company all that it had paid on the timber contract except $1,679.54. If we can reach any conclusion out of this indefinite state of facts it is that on the transaction as a whole (including the purchase of the timber, the settlement of the Walker case, and the refund of $11,189.77 made by the Government) plaintiff made a profit even when its attorney's fees and expenses are included in the cost of the suit.

It may be contended that plaintiff is entitled to recover the $650 which was not refunded by the defendant on the purchase price of the timber, but we think the transaction with reference to the land in sec. 30, twp. 33 south, range 7 E. W. M., should be considered as a whole in determining whether plaintiff was damaged and that it definitely appears that it was not.

Plaintiff's cause of action on the first count is without merit and will be dismissed.

The action set out in the second count of the petition is begun under the so-called tribal contract. In this count, the plaintiff seeks to recover the amount of an increase prescribed by the Commissioner of Indian Affairs in the price

of timber cut above the original contract price. Plaintiff contends that this increase was wrongful and made in violation of the contract.

The tribal contract provided in substance that any advance in stumpage rates to be paid by plaintiff should not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices were fixed. The defendant introduced in evidence Exhibit R, a report in 102 pages, giving statistical information of stumpage rates and wholesale prices of lumber at each of the mills in the Klamath District for the years to which their several contracts applied together with other matters bearing thereon, all in detail. This exhibit was compiled by the Assistant Director of Forestry and the Assistant Forester. The increase in controversy was made April 1, 1928. This exhibit shows that instead of there being any increase in the value of lumber at the mills over the average price for the three years preceding, there was an actual decrease of about $3 per M feet. This seems to be virtually conceded by defendant and definitely shows that the Commissioner had no authority to make the increase in the stumpage price by reason of which plaintiff was required to pay in addition $12,126.39. This matter is considered more at length in the opinion rendered this day in the case of *Forest Lumber Co.* v. *United States*, No. L–391 (*post*, p. 188), where a similar state of facts (a different period being involved) was presented to this court under the same kind of a contract.

Having reached the conclusion stated above, it is unnecessary to consider the other matters which plaintiff claims show that the increase was not made in accordance with the provisions of the contract. The advance in price not having been authorized by the contract, an implied agreement arose to repay the additional amount collected, unless, as contended by defendant, the contract does not bind the Government in any way and it is not responsible for any act done contrary to the agreements contained therein.

It is urged on behalf of defendant that in making the so-called tribal contract in suit through its officials it was

merely acting for the Indians, in their behalf, and for their interest; therefore there was no responsibility on its part for the performance of the contract. In effect the claim is that the defendant, acting through its officials, was merely an agent and that the contract is not a contract of the Government but a contract of the Klamath Indians.

The case is a very peculiar one and we find no authorities directly in point. The contract recited it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians," and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as the "party of the first part" which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School "for the use and benefit of the Klamath Tribe of Indians" the value of the timber at prices fixed in the contract. But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them; it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it. Any contract made by them would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be merely a nullity. We think that where one who executes a contract acts solely under his own powers and rights he becomes liable thereon although the instrument specifies that it is executed in behalf of and for the benefit of a third party. The fact that a contract is entered into by one party for and

Syllabus

on behalf of another party does not necessarily make the contract one of the party who acquired the beneficial interest. We think the words "in behalf of" and "for the benefit of" were used in the contract under consideration for the purpose of showing that the benefits of the contract accrued to the Klamath Indians and not to the United States. Moreover, if the Government was not responsible on the contract, no one was. It is contended that the Government acted in its sovereign capacity in making the contract. This principle applies in certain cases where damages are alleged to result from laws passed by Congress, approved by the President, and then put in force, but we think the principle has no application here. In one sense the Government did act in its sovereign capacity but it is in the same sense that it acts in making any contract which its sovereign powers authorize it to execute. We think the Government can not be heard to deny its responsibility.

It follows from what has been stated above that the plaintiff is entitled to recover on the second count of the petition the amount of overpayment on the contract resulting from the increase prescribed in 1928. Judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

FOREST LUMBER COMPANY, A CORPORATION, v. THE UNITED STATES

[No. L-391. Decided January 12, 1938. Motion for new trial overruled May 2, 1938]

On the Proofs

Contract for purchase of timber on Indian Reservation; tribal contract; increase in price.—Where tribal contract provided in substance that any advance in stumpage rates to be paid by contractor (plaintiff and its predecessors) should not exceed fifty per cent of the increase in average mill run wholesale net value of lumber at mills during the three years preceding, and evidence shows there was no such increase in mill prices, an increase in stumpage prices under the contract was without authority.

Same; discretion of Commissioner of Indian Affairs.—Where both parties to contract previously had "put a practical interpretation upon the contract at variance with its terms"; and where the Commissioner of Indian Affairs had, in the exercise of his discretion, declined to make an increase in stumpage prices for a prior period when he had authority to do so, it was not a valid exercise of discretion to make an increase in a later period, contrary to the limitations of the contract.

Same; liability of the Government under tribal contract.—Where contract recited it was made by the Superintendent of the Klamath Indian School, for and on behalf of the tribe, and purchaser agreed to make payment to said Superintendent "for the use and benefit" of the tribe, said Superintendent was acting, by authority of law, for the Government; and the Government was acting under its own rights and powers, and not as agent; and the contract is a contract of the Government within the meaning of Section 145 of the Judicial Code.

The Reporter's statement of the case:

Messrs. Carl D. Matz and *William S. Bennet* for the plaintiff. *Mr. Jesse Andrews* was on the briefs.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Forest Lumber Company, plaintiff, is a corporation organized under the laws of the State of Delaware, with its principal place of business in Kansas City, Missouri.

2. On August 10, 1920, the Assistant Secretary of the Interior approved a form of contract, pertinent regulations, and a form of advertisement for the sale of approximately 450,000,000 feet of timber, principally Western yellow pine. It was located on about 67,000 acres within Townships 31, 32, 33, and 34, Ranges 8, 9, and 10, Willamette meridian, on what was known as Calimus-Marsh Unit, Klamath Indian Reservation, Oregon. Included as a part of the total quantity of timber on the Calimus-Marsh Unit was about 14,000,000 feet of timber, on about 2,500 acres of allotted land, as to which, prospective bidders were informed, separately approved contracts, with the Indian owners, might probably be made. The form of contract, as approved, provided that it would continue in effect until March 31, 1939.

The advertisement required that sealed bids, in duplicate, be addressed to the Klamath Indian School, Klamath Agency, Oregon. Bids were to be received until 2 o'clock p. m., Pacific Time, on October 27, 1920. Each bidder was required to state in his bid the price that he would pay per M for yellow pine, sugar pine, incense cedar, and for other kinds of timber to be cut and scaled prior to April 1, 1924. The advertisement prescribed that prices, subsequent to that date, were to be fixed by the Commissioner of Indian Affairs, for three-year periods. Prospective bidders were informed that no bid less than $4.00 for yellow pine, sugar pine, and incense cedar, and no less than $1.60 for other species, during the period ending March 31, 1924, would be considered. Each bid was to be accompanied by a certified check, on a solvent National Bank, drawn in favor of the Superintendent of the Klamath Indian School, in the amount of $40,000.

3. On October 26, 1920, Williamson River Logging Company, in response to said published invitation for bids, made its proposal, addressed to the Superintendent, Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow pine, sugar pine, and incense cedar at $5.08 per M feet, and for all other species at $1.85 per M feet. A certified check in the sum of $40,000, drawn on the First National Bank of Klamath Falls, Oregon, payable to the Superintendent of the Klamath Indian School, accompanied the proposal. The proposal provided that in the event the Williamson River Logging Company failed to fulfill its agreement the amount of the check would be retained as liquidated damages, for the use and benefit of the Klamath Indians.

On October 30, 1920, a contract was signed by Williamson River Logging Company. On July 25, 1922, it was approved by the Assistant Secretary of the Interior.

4. On March 19, 1925, Modoc Pine Company acquired this contract by assignment from Williamson River Logging Company. On April 3, 1925, the assignment of the contract from the Williamson River Logging Company to the Modoc Pine Company was approved by the Superintendent of the Klamath Agency, Oregon, and on April 22, 1925, said as-

signment was approved by the Assistant Secretary of the Interior.

On August 10, 1926, Forest Lumber Company, plaintiff herein, acquired the contract by assignment from the Modoc Pine Company. The assignment of the contract by the Modoc Pine Company to the Forest Lumber Company was approved by the Superintendent of the Klamath Agency, Klamath, Oregon, on December 27, 1926, and by the Assistant Secretary of the Interior on January 14, 1927.

Under the contract, the Superintendent agreed to sell to the party of the second part all the merchantable dead timber, standing or fallen, and all the merchantable live timber marked or otherwise designated by the officer in charge for selective logging, as required by the General Timber Sale Regulations, estimated to be about 450,000,000 feet board measure, log scale, more or less, principally Western yellow pine, including so-called bull pine, on the unallotted lands within a tract of about 67,000 acres, known as the Calimus-Marsh Logging Unit within the Klamath Indian Reservation.

5. Said timber contract authorized the purchaser to enter into separate contracts with Indians holding trust patented allotments within the tract known as the Calimus-Marsh Logging Unit, for the purchase of their timber, subject to Indian Service regulations, and according to the terms of this general contract and the general timber sale regulations approved April 10, 1920.

Under the contract, the party of the second part agreed that prior to March 31, 1939, it would cut and remove all timber covered by the contract and pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the timber as should be determined by the actual scale of the timber at fixed rates per thousand feet, board measure, of Scribner Decimal C rule log scale.

Certain provisions of the contract are as follows:

> This agreement entered into at Klamath Agency, Oregon, this 30th day of October 1920, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 855, 857), between the Superintendent of the Klamath Indian School, hereinafter called the superintendent for and in behalf of the Klamath Tribe of Indians,

party of the first part, and Williamson River Logging Company of Chiloquin, Oregon, party of the second part, hereinafter called the purchaser: * * *

For and in consideration of the agreements by the Superintendent the purchaser agrees that prior to March 31, 1939, he will cut and remove all timber covered by this Contract and will pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual sale of the timber at fixed rates per thousand feet, board measure of Scribner Decimal C rule log scale, which rates per specified periods of the contract shall be as follows:

(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called bull pine), sugar pine, and incense cedar; and one dollar and eighty-five cents, for other species.

(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936 such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

* * * * *

For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the Superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents ($22.50) for yellowpine (including the so-called "bull-pine"), sugar pine, and incense cedar, and seventeen dollars ($17.00) for other species.

In determining the stumpage rates to be designated for all timber scaled during the three year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of $22.50 and $17.00 stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations and manufacture during the three year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been

generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three year period directly preceding January 1, 1924.

An advance in stumpage prices prescribed by the Commissioner for the three year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit: *Provided*, That the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.

For the three year periods of the contract beginning April 1, 1927, 1930, and 1933, and 1936, readjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three year period.

Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period.

6. On June 28, 1922, and in conformity with the provisions of the contract, the Williamson River Logging Company furnished its bond in the penal sum of $50,000 to guarantee its faithful performance of the contract.

7. The first price adjustment period under the contract commenced April 1, 1924.

The Williamson River Logging Company experienced delays in commencing operations under its contract. On April 20, 1921, the company requested the Commissioner

of Indian Affairs to grant it an extension of one year within which to begin cutting timber under its contract. In a separate letter to the Commissioner on April 20, 1921, the company applied for an extension of 90 days from that date within which to file the bond required to guarantee performances of the contract. In its letters the company stated the extensions of time requested were necessary because of the then existing financial crisis which made it impossible for the company to obtain the necessary funds to extend its railroad facilities into the timber or to operate its sawmills. Its efforts to obtain suitable bondsmen were unavailing.

On April 23, 1921, the Commissioner, in a letter approved by the Assistant Secretary of the Interior, advised the company that his office was aware of the unusual financial conditions and the marked depression in the lumber market; that his office had no desire to insist upon a strict compliance with the terms of the contract that might result in loss to the company, and ultimately prove disadvantageous to the interests of the Indians; that he would waive the requirement of the contract respecting the quantities of timber to be cut prior to March 31, 1922, but desired that a properly executed and sufficient bond be filed at an early date. The company did not furnish the bond to guarantee performance of the contract until June 28, 1922. The bond and the contract were approved by the Assistant Secretary of the Interior on July 25, 1922.

On May 8, 1923, the attorney for Williamson River Logging Company addressed a lengthy letter to the Commissioner of Indian Affairs relative to the right of way for its logging railroad then under construction. This letter referred to the provisions of the Regulations forming a part of the timber purchase contract, and requested the Commissioner, in order to carry out the letter and spirit of the contract, to require the Central Pacific Railroad, in the construction of its railroad north of Kirk, Oregon, to permit the crossing of its right of way by logging railroads, particularly the railroad of Williamson River Logging Company, where necessary, and to construct such necessary crossings at its own expense.

The company in its letter advised the Commissioner that it had already expended $122,000 in construction work on its railroad line, and that before completion of the main line it would have to expend at least an additional $100,000, not counting the construction of any crossing of the Central Pacific Railroad, north of Kirk; that it was incumbent upon the Indian Service to see that contractors were not burdened with construction and operating costs, when it was within the power of the Indian Service to aid the contractor, to the ultimate profit of the Klamath Indians; that litigation might result in financial embarrassment to the company and prevent it from fulfilling its contract, at considerable loss to the Indians; that the Klamath Tribe was in need of funds, and under the contract would receive in excess of $2,000,000, whereas the sale of the right of way to the Central Pacific would not bring into the tribal funds more than $1,000; that the company should be given a preferential right of way over the right of way of the Central Pacific, and aided in every way so that its contract might be complied with and the Indians derive the greatest revenue from the sale of their tribal and individual timber.

The company had failed to cut the minimum quantities of timber called for by the contract for the period ending March 31, 1923. On May 18, 1923, the company, in a letter to the Commissioner, protested respecting the conditions sought to be imposed by the Superintendent of the Klamath Agency in connection with making up the deficit in cutting the minimum quantities of timber under the contract.

The company continued to suffer from conditions that prevented performance of the contract and in a letter of September 1, 1924, expressed to the Superintendent of the Klamath Agency its regret that conditions up to that time had prevented any operation in the Calimus-Marsh Unit during that contract year. The company failed to cut any timber during the contract year ending March 31, 1925, and advanced a special deposit of $5,000 on account of its previous delinquency for the year ending March 31, 1923.

8. Early in 1925 the properties of the Williamson River Logging Company were taken over by the Modoc Pine Company. On March 19, 1925, the president of the Modoc

Pine Company wrote to the Commissioner of Indian Affairs advising that the Williamson River Logging Company had assigned to the Modoc Pine Company, subject to the approval of the Superintendent of the Klamath Indian School and the Secretary of the Interior, the timber purchase agreement dated October 30, 1920, and that owing to the depressed conditions of the lumber market the Williamson River Logging Company did not operate in 1924 and that, accordingly, on March 31, 1925, there would be due and payable under the contract the sum of $127,000, representing the selling price of 25,000,000 feet of timber at $5.08 per M feet. The Modoc Pine Company requested that the payment of that sum be postponed upon such terms and conditions as might seem proper to the Bureau of Indian Affairs. The president of the Modoc Pine Company in his letter to the Commissioner, also pointed out that operations of the Williamson River Logging Company for the years 1921, 1922, 1923, and 1924 had shown a net loss of about $287,000. He also stated that the Modoc Pine Company stood ready to meet such requirements as might be made by the Office of Indian Affairs, and felt that the Commissioner would agree that the reorganization of the enterprise was in the best interests of the Klamath Indians.

On April 23, 1925, the Assistant Commissioner telegraphed the Superintendent of the Klamath Reservation:

> Advise Modoc Pine Company assignments and bond Williamson River Logging Company contract approved.

On April 22, 1925, the Assistant Secretary of the Interior approved a recommendation by the Assistant Commissioner of Indian Affairs to the effect that the Modoc Pine Company should be required to make immediate payment of $25,000, to be held until past delinquencies in the cutting of required quantities of timber under the contract had been cut and paid for.

On May 27, 1925, the Modoc Pine Company, in a letter to the Superintendent of the Klamath Agency, advised that the requirements of the Indian Office respecting the failure of the Williamson River Logging Company to cut the required minimum quantities of timber under the contract had

been reasonable, but the recent destruction by fire of the Company's sawmill made it impossible to make up the required deficit in cutting. The Superintendent was asked to recommend that the Commissioner of Indian Affairs not require the Company to make the special deposit of $25,000 and, also, to waive the requirement that the Company make up the deficit in the cutting of timber under the contract. The letter contained the following:

> We are fully aware that your entire concern in this and other matters is for the Klamath Tribe of Indians * * *. Only a successful operation on the reservation can be of the greatest benefit to those you represent.

On July 6, 1925, the Assistant Secretary of the Interior approved the recommendation of Commissioner Burk to the effect that, because of the efforts made by the Modoc Pine Company to perform the contract and the recent destruction of its sawmill by fire, the company be relieved from the payment of the special deposit of $25,000, and also the requirement of making up the deficit that accrued under the contract for the period ending March 31, 1925.

On August 10, 1926, the Modoc Pine Company assigned the contract of October 30, 1920, to the Forest Lumber Company. On January 14, 1927, the Assistant Secretary of the Interior approved the recommendation of Commissioner Burke that the Department approve the assignment by the Modoc Pine Company, the acceptance by the Forest Lumber Company, and the bond furnished by the Forest Lumber Company.

9. The second price adjustment period under the contract commenced April 1, 1927.

On February 25, 1927, the Commissioner addressed a telegram to the Forest Lumber Company as follows:

> Stumpage price yellow and sugar pine, Calimus-Marsh Unit, increased one dollar per thousand to become effective April first, nineteen twenty eight.

On April 2, 1927, plaintiff wrote to the Commissioner respecting his action in notifying it that the price of yellow and sugar pine for the adjustment period beginning April 1, 1927, would be increased $1.00 per thousand, but not effec-

tive until April 1, 1928. Plaintiff said that on the basis of the then stumpage price of $5.08 per thousand it had lost $1.02 per thousand for the year 1926 and, in addition, $75,000 in inventory, due to shrinkage in the value of lumber in the yard; that there was nothing in the then present market situation to justify the increase in stumpage made on the Calimus-Marsh Unit and other units in the Klamath Indian Reservation, and requested that it be accorded a hearing.

In a telegram of January 19, 1928, to the Commissioner, plaintiff said that it felt that any increase in the stumpage price under the contract was absolutely unjustified; that analysis had shown that the balance of the timber was of poorer quality; that it was more scattered, required greater logging cost, and consisted of smaller sizes than timber already logged; that log average for 1927 was only 267 feet as compared with 311 feet the previous year; that it had produced 10 per cent more number three shop and lower grades in 1927 than during the previous year; that its 1927 cut was 15.8 per cent under the Government cruise; that in 1926 it lost over $1.00 per thousand, in spite of its logging cost being lower than average Indian timber operator; that it cut only one and one-half million feet per mile of railroad in 1927 as compared to two and one-half million feet in 1926; that its logging superintendent and managers estimated that logging conditions and timber would be worse from then on and that logging costs would be $2.00 or more per thousand higher than on timber already cut; that actual loss on whole operations for 1927 would be over $2.00 per thousand. Plaintiff asked the Commissioner if, in view of the above, he could advise that there would be no increase in stumpage for the three year period ending March 31, 1930; if not, that plaintiff be given a hearing on January 27.

On the following day the Commissioner wired plaintiff's president that he would be pleased to hear him on January 27, regarding the Klamath contract.

10. On February 2, 1928, the Commissioner wrote to Superintendent Arnold, of the Klamath Agency, concerning a conversation with Mr. White, president of plaintiff company, respecting conditions affecting the contract, and re-

quested that the data submitted by Mr. White be studied and that a report be furnished the Commissioner. Said letter contained the following statement:

> While the Office does not concede that the arguments presented demonstrate that an increase in price is not justifiable, it is readily admitted that the amount of timber that may be obtained from each mile of railway built within the Unit has a very direct bearing on the value of the stumpage within such Unit.

During the early part of 1928 there was considerable correspondence between plaintiff and the Commissioner of Indian Affairs respecting the general surrounding conditions, and the quality and quantity of timber cut and to be cut on the Calimus-Marsh Unit. Plaintiff insisted that conditions as actually encountered disclosed that there was a considerable under-run, and that it was obtaining a smaller percentage of number two shop and better grades than it had expected to cut from the unit.

On March 16, 1928, the Commissioner telegraphed plaintiff that the Muck report would not be received before March 22, 1928, and suggested a conference during the week beginning March 26, 1928, if plaintiff desired a hearing respecting Klamath timber.

On March 24, 1928, the Commissioner addressed the following telegram to plaintiff:

> Increase one dollar price yellow pine Calimus-Marsh Unit reduced to forty cents effective April first, nineteen twenty eight can hear you any day between twenty sixth and thirtieth data furnished superintendent and Muck has been considered.

On August 30, 1928, plaintiff wrote to the Commissioner respecting his final action in increasing the stumpage price of yellow pine, sugar pine, and incense cedar by 40¢ per thousand feet, effective April 1, 1928. Plaintiff stated that it felt that no increase was justified for that year; that it had made the cash deposits to cover cutting of the timber, as called for by the contract, because it did not wish to subject itself to the liability of the contract being cancelled; that no part of the deposits made should be applied, or should have been applied to the payment of stumpage at a

rate in excess of $5.08 for yellow and sugar pines, and incense cedar; that it should be permitted to cut the timber during the remainder of the year at the contract rates. Plaintiff also gave notice that its protest was to be a continuing one, and that if payments were made at a rate greater than those specified in the contract for the respective species of timber, it would take such steps as might be necessary to recover from the Government the excess amount so paid. On September 10, 1928, plaintiff's letter was forwarded by the Commissioner to Superintendent Arnold, Mr. Kinney, and Mr. Muck, for report.

11. On October 26, 1928, Mr. Muck, Forest Valuation Engineer, and Mr. Kinney, Chief Supervisor of Forests, in a report prepared at the Klamath Indian Agency, Klamath, Oregon, and addressed to the Commissioner of Indian Affairs, stated that full consideration had been given to the facts and arguments presented by the plaintiff prior to April 1, 1928, and that every possible concession under the terms of the contract had been granted before final action was taken and the conservative increase of 40¢ per thousand made effective; that statements of the Forest Lumber Company for the year 1928 would not be available prior to February 1, 1929; that it was not believed the results from the operations would show the increased stumpage price had been a serious burden; that in the Muck report of March 15, 1928, entitled "The Revaluation of the Timber under Contract on the Klamath Indian Reservation, Oregon," it was pointed out that the cost of logs, inclusive of stumpage at the Forest Lumber Company mill at Pine Ridge, Oregon, was very reasonable when compared with the district at large; that this log cost was not a material contributing factor to the losses reflected by the Company's operations during the years 1926 and 1927; that it was believed that this condition would continue during the year 1928, for the reason that there had been no material change in the factors involved, and that the conservative price increase of 40¢ could not possibly operate to impose a serious burden on the purchaser; that the reason for the unfavorable showing by the plaintiff at Pine Ridge was one of over-investment in mill and plant, and unbalanced ratio between

fixed capital and production; that these considerations could not be permitted to involve the value of timber on the Calimus-Marsh Unit; that the revaluation of the timber under the contract was based on the general rise in value which had taken place in this competitive field, and was essential for the protection of the Klamath Indians, and fully justified in the light of existing conditions; that the action respecting the increased stumpage price, effective April 1, 1928, was subsequently supported by the favorable trend in the lumber market which had occurred during the preceding six months; that the industry was making substantial progress; that the volume of business had increased materially, and that there had been a strengthening of price levels; that according to reports of the California White and Sugar Pine Manufacturers Association, production in Northern California and Southern Oregon showed an increase of over 12 per cent over the year prior, and that orders showed an increase of over 5 per cent; that orders exceeded production, and that many mills were booked far ahead; that the price of number two shop which had averaged \$26.70 during 1927 had increased to \$27.85 at the then present writing—in fact, that there had been a general upward trend in practically all grades, and that the average price of pine lumber f. o. b. mills in Southern Oregon and Northern California had advanced at least \$1.00 per thousand over one year prior; that the outlook was generally favorable, and that the industry was in a more substantial position than had obtained during the preceding two years; that no action appeared necessary at the then present writing, and it was recommended that the matter be held in abeyance until after the first of the approaching year; that if an investigation of facts then available should show the increase effective April 1, 1928, to have been a burden on the Forest Lumber Company, the Commissioner, under the terms of the contract, would have discretion to relieve the purchaser of a part or all of the increase of 40¢ per thousand.

12. On May 23, 1929, plaintiff wrote to the Commissioner that it desired to renew the protest made by it on August 30, 1928, against the increase of 40¢ per thousand feet for yel-

low pine (including so-called "bull pine"), sugar pine, and incense cedar, on the Calimus-Marsh Unit, under the contract of October 30, 1920, as to all deposits made or to be made during the year 1929.

During the year 1929, several letters passed between the Superintendent of the Klamath Agency and the Commissioner concerning plaintiff's complaint made early in 1928 to the effect that it had sustained an exceptionally low under-run on the Calimus-Marsh Unit. The Commissioner was advised by the Superintendent that he found that the company received a fair over-run, as compared with the over-run received at the different mills in that region; that the Service had been fair in its scaling methods, and that the low over-run was not due to the methods used by the Indian Service in the scaling of the timber, but was due more to the manner in which over-run was computed by the Forest Lumber Company.

13. The third price adjustment period under the contract commenced April 1, 1930.

On January 11, 1930, the Commissioner forwarded to Superintendent Arnold of the Klamath Indian Reservation, certain exhibits and reports that had been filed by the plaintiff, at a hearing before the Assistant Secretary, upon an appeal from the requirements of the Commissioner of Indian Affairs that the price of yellow pine on the Calimus-Marsh Unit be increased 40¢ effective April 1, 1928. The reports dealt with the quality of the timber, the topography, logging conditions, and costs experienced by the company. The Superintendent was advised that the Commissioner had forwarded to Mr. Muck, Forest Valuation Engineer, a copy of said letter and copies of the reports prepared by plaintiff's representatives; that it would be impracticable for Mr. Muck to make an examination of the Calimus-Marsh area, and requested that a full report respecting conditions on this area be prepared by the forestry employees at Klamath Agency and forwarded to Mr. Muck for his consideration and submission with his report to the Commissioner in connection with the next readjustment of stumpage prices on the Calimus-Marsh Unit, on April 1, 1930.

On January 11, 1930, the Commissioner forwarded to Mr. Muck, Forest Valuation Engineer, copies of the pertinent letter and reports, and directed that in his study of readjustment of stumpage prices on the Klamath Reservation, effective April 1, 1930, special consideration be given to the claim of the Forest Lumber Company that the timber remaining on the Calimus-Marsh Unit was inferior in quality, and that conditions were such that a stumpage price in excess of the original price of $5.08 per thousand on yellow pine could not be justified.

On February 15, 1930, the Commissioner wrote to plaintiff advising that the third readjustment of stumpage prices on the Calimus-Marsh Unit would occur on April 1, 1930, and that the contract required notice of any increase to be given March 1, 1930; that there had been so much delay on the part of the lumber companies in the Klamath District in furnishing financial statements that it would be difficult to make a complete study of the same in order that notice might be given prior to March 1st. Plaintiff was asked to advise whether it would consent to notice respecting possible price increases any time prior to April 1, 1930.

On February 26, 1930, plaintiff by telegram informed the Commissioner that it desired that he be fully informed as to the Company's situation before reaching his conclusion, and that it consented to notice being given it any time prior to April 1; that it was sure the Commissioner would bear in mind what had occurred at the hearing before First Assistant Secretary Dixon on the preceding December fifteenth.

14. On February 26, 1930, the Commissioner addressed the following telegram to plaintiff:

> There will be no increase on April first on Calimus Marsh unit above stumpage prices of five dollars and forty-eight cents and one dollar and eighty-five cents now being paid you will be advised later whether further study seems to justify a reduction on yellow pine, sugar pine, and incense cedar.

On February 27, 1930, the Commissioner addressed a letter to Superintendent Arnold of the Klamath Agency, and enclosed copies to Mr. Muck, Forest Valuation Engineer,

and James A. Haworth, Jr., lumber man at large, concerning the readjustment of stumpage prices under the contract. He stated that no increase was made on April 1, 1924, but for the second period beginning April 1, 1927, an increase of 40¢ was made effective, but that the purchaser was relieved from the payment of any increase beginning April 1, 1927; that a preliminary report by Mr. Muck, Forest Valuation Engineer, dated February 21, 1930, and concurred in by Mr. Haworth, recommended that no increase be made over the $5.48 per thousand feet for yellow pine, sugar pine, and incense cedar, and $1.85 for other species during the three-year period beginning April 1, 1930. He stated that a memorandum concurring in the recommendation, and signed by William H. Zeh, Supervisor of Forests at Klamath, and Superintendent Arnold, was on file; that Mr. J. P. Kinney, Chief Supervisor of Forests, and familiar with the history of the contract and the sale area, and who had reviewed the several financial statements submitted by Mr. Muck, also concurred in the view that an increase above the then present prices could not be justified; that a full report on the Klamath situation could not be presented by Mr. Muck at that time because of the failure of several lumber companies operating in the Klamath District to furnish their financial statements; that the Forest Lumber Company had urged a reduction in the price of yellow pine, sugar pine, and incense cedar to the price of $5.08, originally bid; that financial reports from other operators, and a full report on the re-cruise of the timber on the Calimus-Marsh Unit must be received and carefully analyzed before a determination could be reached as to whether the requested reduction in price could be made. In the letter the Superintendent was directed to advise the Forest Lumber Company that the stumpage price for yellow pine, sugar pine, and incense cedar, cut after March 31, 1930, would be $5.48, unless the investigation of the special conditions obtaining on the Calimus-Marsh should show that a reduction from the price of $5.48 was justifiable; and that the investigation would be completed at the earliest practicable date and notice given him in order that he

might inform the Forest Lumber Company of any reduction in price.

15. On April 8, 1930, plaintiff in a letter to the Commissioner of Indian Affairs expressed the hope that the investigation then being made would be completed at an early date, and the results would justify a reduction as requested by it; that conditions in the California market were quite bad, the market having dropped about $3.00 to $3.50 per thousand since early last fall; that it seemed certain that plaintiff was faced with a substantial loss in its operation for that year; that it assumed the relief, if granted, would be effective from the date the increased price was first made.

On April 29, 1930, the Commissioner addressed a letter to the plaintiff, which letter was approved by Assistant Secretary of the Interior Joseph M. Dixon on May 1, 1930, advising that after a re-cruise of the timber and a thorough examination of all factors connected with logging operations and quality of timber remaining on the Unit the conclusion had been reached that the interests of the Klamath Indians would be fully protected through a reduction of 40¢ from the existing price, effective April 1, 1930; that this reduction was made because plaintiff had established that the timber remaining on the Unit was of inferior quality; that logging would be comparatively expensive; that because of the damage to the timber by fire and insects the volume to be obtained from the remaining area of the Calimus-Marsh Unit was substantially below the volume as shown on the original cruise. The letter concluded:

"This action does not operate to relieve the Forest Lumber Company from the increase of 40¢ per thousand feet on the species above named that was effective from April 1, 1928, to April 1, 1930."

On May 6, 1930, Superintendent Arnold of the Klamath Agency in a letter to plaintiff advised that he had received notice from the Commissioner of Indian Affairs that the company had been granted a reduction in the stumpage price of yellow pine, sugar pine, and incense cedar on the Calimus-Marsh Unit from $5.48 to $5.08, effective April 1, 1930; that a credit would be allowed Forest Lumber Company on all

deposits for timber scaled after April 1, 1930; that the report mailed to plaintiff covering timber scaled during the month of April 1930, showed that the footage of yellow pine scaled was 5,090,350 feet; that a reduction of 40¢ per thousand on this footage amounted to $2,036.14; and that an entry had been made on the Klamath Agency records crediting the company's account and increasing its advanced deposit balance by that amount.

16. On May 7, 1930, plaintiff wrote to the Commissioner that it appreciated his action in reducing the stumpage price of yellow pine, sugar pine, and incense cedar, from $5.48 to $5.08 per thousand effective April 1, 1930, but was disappointed to learn that he did not see fit to make the price reduction effective from April 1, 1928; that it felt that the showing made by it in its petition and conference justified the reduction of 40¢ to be made effective as of April 1, 1928, not only on account of the extremely unfavorable conditions on that unit, but also on account of the comparative values of lumber for the periods, as outlined in the contract. Plaintiff requested the Commissioner to again review the matter and advise whether he did not feel it proper to make the reduced price effective as of April 1, 1928.

On June 3, 1930, the Commissioner replied to plaintiff's letter of May 7, 1930, and advised that he was unwilling to make a reduction in price for the two years ending March 31, 1930.

On July 20, 1932, plaintiff requested the Commissioner to relieve it from cutting the minimum quantity of timber under the contract for the year ending March 31, 1933. The action thereon by the Commissioner in granting plaintiff's request was approved by First Assistant Secretary of the Interior Joseph M. Dixon, July 29, 1932.

Acting under authority of the act of June 25, 1910 (36 Stat. 855, 857), the act of March 4, 1933 (47 Stat. 1568), and the act of June 16, 1933 (48 Stat. 311), the original contract of October 30, 1920, was modified to provide for the reduction of the price of yellow pine (including so-called "bull pine") and sugar pine to $3.00. The prices of other species were also reduced.

The original contract as modified by the agreement of February 21, 1934, left plaintiff until March 31, 1939, to perform its contract.

17. From April 1, 1928, to March 31, 1929, plaintiff cut 57,483,080 feet board measure of yellow and sugar pine. That quantity of timber, at 40¢ a thousand feet board measure, totals $22,993.23.

From April 1, 1929 to March 31, 1930, plaintiff cut 54,448,-480 feet board measure of yellow and sugar pine. That quantity of timber, at 40¢ a thousand feet board measure, totals $21,779.39.

The total quantity of yellow and sugar pine cut by the plaintiff during the contract periods beginning with April 1, 1928, and ending March 31, 1930, totalled 111,931,560 feet board measure. That quantity of timber at 40¢ a thousand feet board measure, totals $44,772.62.

18. During the period between January 14, 1927 (the date on which the Assistant Secretary of the Interior approved the acceptance by the plaintiff of the assignment from the Modoc Pine Company of the contract of October 30, 1920), and March 31, 1930 (the end of the period during which the 40¢ increase remained effective), plaintiff paid an average stumpage of $5.28 per thousand feet board measure.

On January 22, 1927, the Assistant Secretary of the Interior approved the assignment to the plaintiff of a contract dated July 30, 1924, for the purchase by the Fremont Land Company of timber on the North Marsh Timber Unit in the Klamath Indian Reservation. The initial price stipulated in the contract for the first period ending March 31, 1928, for yellow pine and sugar pine was $5.53. The contract provided for a fixed increase in the stumpage rates during the remaining three-year periods, specified therein. A 12% increase in price became effective April 1, 1928, advancing the price for yellow and sugar pine to $6.19. In the acquisition of this contract, plaintiff paid a premium above the original stumpage price of $5.53 stipulated in the contract.

19. During the period of 14 years prior to 1931, the Indian Service made an exhaustive investigation and study of the comparative production costs and selling price trends of

timber within the Klamath Region, for the purpose of establishing a basis which would guide the Commissioner of Indian Affairs in determining the stumpage rates to be fixed by him during each of the three-year periods specified in the contract.

The area specified in the contract of October 30, 1920, as "Southern Oregon and Northern California" has always been understood, by lumbermen and engineers familiar with the locality, as embracing the Klamath Region. Speaking generally, this region is a definite economic unit in the lumber industry, and is composed primarily of Klamath County, Oregon, and small parts of Lake County, Oregon, and Modoc County, California. Topographically, this economic unit embraces the Klamath Basin which is bounded on the west by the Cascade Mountains; on the north by the divide between the waters of the Williamson and Deschutes Rivers; on the east by the Lake View Basin, and on the south by the Lava Beds of Northern California. The principal producing center of this region is Klamath Falls, Oregon. Lumber manufacturing operations are, comparatively speaking, centralized within the vicinity of that place and all the larger companies located there operate under similar physical and industrial conditions, and distribute their products through the same markets.

During each year from 1917 to 1931, the Indian Service had compiled statistical information covering the market price and production cost trends of lumber in the Klamath Region, which data had been abstracted from the certified operating statements from the principal lumber-producing companies operating within the Klamath Region. These certified statements were submitted to the Commissioner of Indian Affairs by the various companies competing for timber within the Klamath Reservation and form a part of the permanent record of his office.

To assist the Commissioner of Indian Affairs in making the stumpage price adjustments under the contract that official assigned an expert timber valuation engineer to make a special study of production costs, and of sale price trends of lumber at the mills within the Klamath Region, and to submit yearly reports showing the trends of such

costs and sales prices within that region. Such reports were made for the years 1920, 1923, 1924, 1926, 1927, 1928, 1929, 1930, and 1931. This valuation engineer was thoroughly familiar with the timber within the area covered by the contract, having been assigned to survey that timber as early as 1913. All the yearly reports touching the price trends of timber within the Klamath Region were made to the Commissioner of Indian Affairs by this engineer. The reports are comprehensive, and give effect to every factor affecting the trend of production costs and selling prices.

20. The statistical studies and reports made by the Valuation Engineer showed that during the contract period the average mill run net wholesale value of pine lumber within the Klamath District fluctuated from a low of $17.49 in 1917, to a high of $42.44 in 1920. Sales prices remained at comparatively high levels from that year through to 1925, and thereafter gradually declined to $24.73 in 1927, rising again to $25.50 in 1929.

Production costs within the same area showed a corresponding fluctuation during the period in question, rising from a low of $15.33 per M feet in 1917, to a high of $30.70 per M feet in 1920. Production costs remained at a comparatively high level through 1923, the level for that year being $28.01 per M feet, and gradually declined thereafter to $23.38 in 1928, again rising to $25.07 in 1929.

From 1917 to 1929 the stumpage prices of pine timber in the open competitive market in this area ranged from a low of $3.25 to a high of $8.00 per M feet. The record shows that the prices of stumpage within the pertinent period of the contract fluctuated greatly. The graph evidencing the trend of stumpage prices within this competitive area reflected only a comparatively slight increase in prices during and immediately following the years of highest sales prices for lumber, namely, 1919 to 1923. It showed frequent recessions in the stumpage price trend during that period. In 1917 the average sale price of stumpage within the competitive area was $3.44, whereas 10 years later the average sale price of stumpage within the Klamath Region was $7.64 per M feet.

21. The average mill run, net wholesale prices of California white and sugar pines, applicable to the Forest Lumber Company contract, for the respective three-year periods here involved, were, as shown by the defendant's "Exhibit R," page 82, as follows: For the years 1917, 1918, and 1919, $23.10; for the years 1921, 1922, and 1923, $30.26; and for the years 1924, 1925, and 1926, $27.00.

22. The contract was to extend from October 30, 1920, to March 31, 1939. It specified that the prices for pine stumpage for the period ending March 31, 1924, should be $5.08 per thousand feet board measure, and for the three-year periods of the contract term beginning April 1, in the years 1924, 1927, 1930, 1933, and 1936, such prices as should be fixed by the Commissioner of Indian Affairs, in the manner therein prescribed.

The parties agreed that the rates to be fixed by the Commissioner for each of the three-year periods specified should be determined, after a careful consideration of the cost of logging operations and lumber manufacture, in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California regions, during the three years preceding January 1 of each year in which the new rates were to be fixed.

The contract provided that such new rates should lie wholly within the discretion of the Commissioner of Indian Affairs; that a hearing should be afforded the purchaser, upon written request made at least 15 days before the date upon which the new stumpage rates were to be made effective; and that the new schedule should be determined, and notice given to the purchaser not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936.

As a basis of comparison in fixing the readjusted prices under the contract it was agreed therein that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three-year period ending January 1, 1920, was $22.50 for yellow pine.

The only limitation imposed by the contract on the discretionary authority of the Commissioner, in the matter of fixing the stumpage rates to be paid during the three-year

periods specified in the contract, was the provision that such stumpage rates—

> * * * shall not exceed 50% of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner, a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit; Provided that the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.

23. The first price adjustment period stipulated in the contract was to commence on April 1, 1924. On February 25, 1924, the Commissioner wired the Chief Clerk, Klamath Agency, Oregon:

> Exhaustive consideration all factors involved indicates no increase in stumpage prices should be made on Cliff Boundary, Solomon Butte, Little Sprague, Chiloquin, and Calimus-Marsh Units. Advise purchasers.

The Williamson River Logging Company, one of plaintiff's predecessors in title, had, from the inception of the contract, experienced financial difficulties, and was in default in cutting the required quantities of timber under the contract. Shortly thereafter, the affairs of that company underwent a reorganization, and in 1925 the contract was assigned to the Modoc Pine Company, plaintiff's immediate predecessor in title.

Following the approval by the Assistant Secretary of the Interior on January 14, 1927, of the assignment of the contract from the Modoc Pine Company to the plaintiff, the question respecting the readjustment of stumpage prices for the second contract period, beginning April 1, 1927, came before the Commissioner.

As required by the contract, plaintiff was notified by the Commissioner on February 25, 1927, that commencing April 1, 1927, the price of pine stumpage on the Calimus-Marsh Unit would be increased by $1.00 per thousand feet board measure, but that the increase would not become effective

until April 1, 1928. The action of the Commissioner in suspending until April 1, 1928, the price increase made effective by him under the contract on April 1, 1927, was taken because of the depressed condition of the lumber market in that year.

On March 28, 1928, the Commissioner notified plaintiff that he had reduced the increased price of pine stumpage on the Calimus-Marsh Unit from $1.00 to 40¢, effective April 1, 1928. Plaintiff protested that the proposed increase was not warranted, in view of conditions then existing in the lumber industry, stating that the company was operating at a loss. Plaintiff also submitted to the Commissioner data to support its contention that logging conditions and the quality of timber on the Calimus-Marsh Unit would not enable it to operate at a profit.

On February 26, 1930, the Commissioner notified plaintiff that there would be no increase on April 1, 1930, on the Calimus-Marsh Unit, above the price of $5.48 then being paid for pine stumpage and that he would advise plaintiff later whether further study seemed to justify a reduction in that price.

On April 29, 1930, the Commissioner notified plaintiff that after a re-cruise of the timber, and a thorough examination of all factors affecting logging operations and the quality of timber remaining on the Unit, he had concluded that the interests of the Klamath Indians would be fully protected through a reduction of 40¢ from the existing price, effective April 1, 1930, making the stumpage price payable for yellow and sugar pine after that date $5.08, which was the price originally fixed in the contract. Plaintiff was expressly advised, however, that this action would not relieve it from the increase of 40¢ per thousand feet for yellow and sugar pine from April 1, 1928, to March 31, 1930.

Following the passage of permissive legislation the contract was modified on February 21, 1934, and the price of pine stumpage reduced to $3.00 per thousand feet. The modification of the contract was consented to by the Klamath Indians in General Council. It was approved by the Secretary of the Interior on March 3, 1934.

24. The comparative cost studies, conducted by the Valuation Engineer and his assistants under the direction of the Commissioner of Indian Affairs, indicated that prior to 1925, sales of stumpage within the Klamath Reservation had remained at reasonably conservative levels. Beginning with 1925, and thereafter, the prices within that region rose to abnormally high levels, due primarily to the keen competition for such stumpage. The initial price for pine stumpage, under the contract, was $5.08, and was to remain effective during the contract period ending March 31, 1924. That initial price of $5.08 remained effective until April 1, 1928, at which time it was increased by 40¢, making the stumpage price, effective on that date, $5.48 per thousand feet. That increase was later reduced, and effective April 1, 1930, the price was again fixed at $5.08 per thousand feet for yellow and sugar pine.

During the same period stumpage prices for timber within the Klamath Region had risen, in some instances to $8.00 per thousand feet in 1926 and 1927. The average stumpage price, under competitive bidding, during 1926 and 1927 was $7.63. In 1928 that average dropped to $5.00, rising again to $6.92 in 1929.

25. The sale of timber upon the allotted and unallotted lands of the Klamath Indian Reservation was authorized by the act of June 25, 1910, Sections 7 and 8 (36 Stat. 855, 857). Regulations promulgated by the Secretary of the Interior, as required by that Act, prescribed the procedure to be followed in the sale of the timber and the disposition of the proceeds thereof.

The Secretary of the Interior also approved forms of advertisement and contracts to be used by the respective superintendents of Indian reservations in the sale of timber, upon either unallotted or allotted lands, which forms were made a part of the regulations. The standard Form of Contract was used in making the contract involved in this suit. The form of contract of October 30, 1920, except for minor modifications, and a provision for a fixed 12% increase in the price of stumpage every three years, had been used in every sale of timber on Indian reservations since

the passage of the act of June 25, 1910. Contracts for the sale of timber from unallotted lands of Indian reservations made prior to the act of June 25, 1910, were similar in form to the contract of October 30, 1920, so far as relates to the designation of the parties thereto.

The practice followed by the Bureau of Indian Affairs in the sale of timber on Indian reservations under the act of June 25, 1910, was uniform. Whenever the Commissioner of Indian Affairs determined that timber on Indian reservations should be sold, the procedure was for the Superintendent of the Indian reservation to advertise definite units of timber for sale, accept bids, and forward an abstract of such bids to the Commissioner of Indian Affairs in Washington, together with his recommendation respecting the award to be made. The contract was then prepared in the form prescribed by the regulations, and signed by the Superintendent, on behalf of the tribal Indians. When signed by the purchaser, the contract was forwarded by the Superintendent to the Commissioner of Indian Affairs for approval, either by him or by the Secretary of the Interior, depending upon the value of the timber involved in the contract. Under the provisions of the contract of October 30, 1920, the purchaser agreed that within six months from the date of approval of the contract, it would enter into approved separate contracts of purchase with those Indians holding allotments within the sale area covered by the tribal contract who desired to sell their timber thereon. These allotment contracts were subject to the same procedure with respect to the making thereof, and prices to be paid for the timber, as was followed in the making of the tribal timber contract. Contracts for the sale of timber, either upon unallotted or allotted lands, were made under the supervision of the Secretary of the Interior. According to the record, no contracts for the sale of Indian tribal timber were ever made in the form and manner prescribed by R. S. 2103. Such contracts have always been made in substantial compliance with the form of contract made by the purchaser herein on October 30, 1920.

26. The contract of October 30, 1920, was to be performed prior to March 31, 1939. The record does not disclose the

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amounts of money already paid under the contract by the plaintiff and its predecessors in interest.

The act of March 3, 1883 (22 Stat. 582, 590), as amended by the act of May 17, 1926 (44 Stat. 560), provided that the proceeds of the sales of timber on any Indian reservation, except those of the Five Civilized Tribes, should be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of such tribes, and under such regulations as the Secretary of the Interior should prescribe.

The act of March 2, 1887 (24 Stat. 449), vested in the Secretary of the Interior discretionary authority to expend such proceeds for the benefit of the tribal Indians concerned.

Section 27 of the act of May 18, 1916 (39 Stat. 123, 158), prescribed the procedure to be followed with respect to the expenditure of tribal Indian funds covered into the Treasury and deposited to the credit of the tribes, pursuant to the acts of March 3, 1883, and March 2, 1887.

The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned, upon the books of the Treasury, and subject to the order of such Indian.

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any United States Indian agent, or superintendent, to deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such private banks as he might select, subject, however, to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds.

The act of May 25, 1918 (40 Stat. 561), authorized the Secretary of the Interior to withdraw from the Treasury such tribal funds as were susceptible of segregation, and

to credit an equal share thereof to each member of that tribe, and to deposit the funds in private banks, subject to withdrawal, for payment to the individual owners, or expenditure for their benefit.

27. The record discloses that all moneys paid by the purchaser to the Superintendent of the Klamath Indian School for the timber cut by it under the tribal timber contract of October 30, 1920, and the several allotment contracts made thereunder with individual Indian owners, less the sum of 8% thereof, were deposited by the Superintendent, either in private State banks or in the Treasury of the United States, to the credit of the tribal or individual Indians concerned. The contract of October 30, 1920, and the several contracts made by the purchaser with the holders of allotments were administered as one contract, and all the proceeds arising under such contracts were paid to the Superintendent. No part of the net proceeds inured to the benefit of the United States. The proceeds arising under the tribal contract were deposited in the Treasury under an account designated "Indian Moneys, Proceeds of Labor, Klamath Indians."

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber, in accordance with paragraph 21 of the amended regulations approved March 17, 1917, and the provisions of Section 1 of the act of February 14, 1920. These acts authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for the work incident to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales. This 8% was deducted by the superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses incident to administering the contract of sale and the Indian forests. It was deposited in the Treasury, to the credit of the United States, under the caption "Miscellaneous Receipts."

Upon receipt of proceeds from the purchaser the Superintendent of the Klamath Reservation made a credit upon books kept in his office at the Klamath Agency in Oregon, showing the amount of money payable to the Klamath Tribe of Indians, as well as the individual Indian allottees

concerned. This action was based upon scale reports made by civil service employees of the United States attached to the Klamath Indian Agency. The money belonging to individual Indian allottees was deposited in private banks, in a lump sum, to the credit of the Superintendent or disbursing officer of the Indian Agency, who held such moneys in trust for the respective Indian allottees. The banks selected as depositaries for individual Indian moneys kept no record of the individual Indian accounts. These trust funds were subject to withdrawal by the Superintendent of the reservation, and were distributed by him to the individual owners thereof, under regulations prescribed by the Commissioner of Indian Affairs and approved by the Secretary of the Interior. In cases involving large sums of money the matter was submitted to the Commissioner of Indian Affairs for authorization to distribute such moneys.

28. Early legislation vested unlimited discretion in the Secretary of the Interior with respect to the expenditure of moneys credited to the tribal Indians. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), restricted this discretion but authorized the Secretary of the Interior to expend such funds for "equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments." During the period from 1922 to 1934, per capita payments in excess of $6,200,000 were made direct to the Klamath Indians, on account of the proceeds derived from the sale of timber on that reservation. Competent Indians were paid their share of the per capita payments directly. The per capita shares of other Indians were deposited to their accounts, and the expenditure thereof was subject to departmental regulations.

Prior to 1927 it was the practice for the Superintendent of the Klamath Indian Reservation to submit accounts of all the Indian moneys in his possession to the Office of the Bureau of Indian Affairs, and it was not then the practice of the General Accounting Office to review such reports. However, subsequent to 1927, the General Accounting Office has reviewed the accounts of superintendents concerning Indian moneys in their possession.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff in this suit seeks to recover the sum of $44,772.62, alleged to have been illegally collected by the defendant as a part of the contract price for certain timber sold by the defendant to the plaintiff.

On August 10, 1920, pursuant to act of June 25, 1910 (36 Stat. 855), the Assistant Secretary of the Interior approved a form of contract and pertinent regulations, and also a form of advertisement, for the sale of approximately 450,000,000 feet of timber located on about 67,000 acres of what was known as Calimus-Marsh Unit, Klamath Indian Reservation, Oregon. The advertisement required that sealed bids, in duplicate, be addressed to Klamath Indian School, Klamath Agency, Oregon. Each bidder was required to state in his bid the price that he would pay per M feet for yellow pine, sugar pine, incense cedar, and for other kinds of timber cut and scaled prior to April 1, 1924. The advertisement stated that the prices, subsequent to April 1, 1924, were to be fixed by the Commissioner of Indian Affairs, for three-year periods.

On October 26, 1920, Williamson River Logging Company, in response to the invitation for bids, made its proposal, addressed to the Superintendent, Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow pine, sugar pine, and incense cedar at $5.08 per M feet; and for all other species at $1.85 per M feet. On October 30, 1920, a contract was signed by Williamson River Logging Company. On July 25, 1922, it was approved by the Assistant Secretary of the Interior.

On March 19, 1925, Modoc Pine Company acquired the contract by assignment from Williamson River Logging Company. On April 3, 1925, this assignment was approved by the Superintendent of the Klamath Agency, Klamath, Oregon, and on April 22, 1925, by the Assistant Secretary of the Interior.

On August 10, 1926, plaintiff acquired the contract by assignment from the Modoc Pine Company. This assign-

ment was approved by the Superintendent of the Klamath Agency, Klamath Falls, Oregon, on December 27, 1926, and by the Assistant Secretary of the Interior on January 14, 1927.

The contract provided that the timber covered in the contract should be cut and removed by the purchaser prior to March 31, 1939, and that the purchaser should pay for such timber its value as specified in the contract, as follows:

> (a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called "bull pine"), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.
>
> (b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

The contract provides the precise method for an adjustment by the Commissioner of Indian Affairs of the stumpage rates to be paid by plaintiff for the three-year period beginning April 1, 1924, and also for each of the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, as follows:

> For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents ($22.50) for yellow pine (including so-called "bull pine"), sugar pine, and incense cedar, and seventeen dollars ($17.00) for other species.
>
> In determining the stumpage rates to be designated for all timber scaled during the three-year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of twenty-two dollars and fifty cents ($22.50) and seventeen dollars ($17.00) stipulated in the preceding paragraph as basic values, and

the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations and manufacture during the three-year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three-year period directly preceding January 1, 1924.

The first period for which the Commissioner of Indian Affairs could increase stumpage rates provided in the contract was for the three-year period beginning April 1, 1924. However, he made no increase in stumpage rates for that period and notified plaintiff's predecessor to that effect on February 25, 1924. The next three-year period for which an increase could be made, if the facts warranted it, was that beginning April 1, 1927. The Commissioner on February 25, 1927, notified plaintiff that stumpage prices provided in the contract would be increased $1.00 per M feet to become effective April 1, 1928. The plaintiff upon the receipt of this notice immediately wrote the Commissioner of Indian Affairs protesting against the increase, saying that on the basis of the then stumpage price of $5.08 per M feet it had lost $1.02 per M feet for the year 1926, and that there was nothing in the then market situation to justify the increase. This protest was renewed on January 19, 1928, by telegram, in which plaintiff pointed out in great detail its reasons for protesting the increase and requested that it be given a hearing. Following this telegram there was considerable correspondence between the plaintiff and the Commissioner respecting the general conditions, and the quality and quantity of timber cut and to be cut. On March 24, 1928, the Commissioner informed the plaintiff by telegram that the increase of $1.00 per M feet would be reduced to 40 cents per M feet effective April 1, 1928. The increased price went into effect April 1, 1928, and remained in effect to March 31, 1930, during which period plaintiff cut 111,931,560 feet of yellow and sugar pines. That quantity at the increased rate of 40 cents per M feet amounts to $44,772.62, the amount involved in suit.

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The authority of the Commissioner of Indian Affairs to make an increase of 40 cents per M feet in the stumpage rates during the period April 1, 1928, to March 31, 1930, constitutes the sole issue in the case. The relevant facts bearing on this issue, while apparently somewhat complicated, are in fact quite simple. Although, in the language of the contract, "the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs," the contract places an important limitation on his discretionary power to increase stumpage prices by the provision:

> Any advance in stumpage prices prescribed by the Commissioner for the three-year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924.

The limitation on the authority of the Commissioner to make advance in stumpage rates for the three-year period beginning April 1, 1924, is likewise applicable to each of the subsequent three-year periods of the contract by the following provision:

> For the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, re-adjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three-year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three-year period.

While the Commissioner in determining the stumpage rates to be designated for timber cut during the three-year period beginning April 1, 1927, was required by the contract to compare the cost of logging operations and lumber manufacture during the three-year period preceding April 1, 1927 with the three-year period preceding April 1, 1924, for the purpose "of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on

logging and manufacture operations" during the three-year period directly preceding April 1, 1927, he was without authority, whatever such comparison might show, to increase the price of stumpage for the coming three-year period more than 50% of the net increased sales price of lumber for the current three-year period over the price of lumber for the preceding three-year period. There was an actual decrease in the wholesale price of lumber f. o. b. mills during the three-year period beginning April 1, 1924, over the wholesale price of lumber during the preceding three-year period. This is established by proof adduced by the defendant in its Exhibit "R," page 82, showing that the wholesale price for M feet in the Klamath District was $30.26 for the three-year period April 1921, 1922, and 1923, and that the wholesale price for the three-year period 1924, 1925, and 1926 averaged $27.00 per M feet. This fact is recognized by the defendant in its brief:

> At the outset we concede and the record shows that during the pertinent three-year periods, namely, 1924–1926, there was a decrease in the wholesale price of lumber as compared with the preceding three-year period specified in the contract, namely, 1921–1923. The defendant adduced proofs to establish these facts.

In view of these conceded facts it is clear that the Commissioner of Indian Affairs was without authority to make an increase in stumpage prices for the period beginning April 1, 1927. He was not only without authority to make an increase in stumpage prices for that period, but he was prohibited from so doing by the plain provisions of the contract. The defendant, however, contends that the Commissioner of Indian Affairs and plaintiff, particularly plaintiff's predecessors in title, had throughout the performance of the contract, and before any controversy respecting it had arisen, put a practical interpretation upon the contract at variance with its terms. It is contended that this practical interpretation is controlling and authorized the Commissioner to make the price increase in question. It is urged that the unanticipated economic exigencies that followed the post-war period and which continued for several years thereafter, and also the financial difficulties suf-

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fered by plaintiff's predecessors in title, made it necessary for the Commissioner in dealing with plaintiff and its predecessors to depart from the literal terms of the contract and put upon it a practical interpretation in order to work out substantial justice between the purchaser and the Indians. It is particularly urged that under the strict terms of the contract the Commissioner could have made a substantial increase in stumpage prices for the period beginning April 1, 1924, but that because of the practical interpretation put upon the contract by the parties he made no such increase and by so doing departed from the strict terms of the contract in order to benefit plaintiff. The defendant says that if the practical interpretation put upon the contract for the benefit of plaintiff and its predecessors can be sustained as a valid exercise of the discretion vested in the Commissioner, then it follows necessarily that the discretionary action of the Commissioner in increasing the price of stumpage by 40 cents per M feet for the benefit of the Klamath Indians, effective April 1, 1928, was likewise a valid exercise of the discretion vested in him by the contract.

We think the contention of the defendant is without merit. It is true that the Commissioner of Indian Affairs made certain concessions to plaintiff's predecessors because of financial difficulties and other obstacles encountered by them in the early stages of performance of the contract. These concessions, however, had no relation to stumpage prices to be paid under the contract and have no materiality to the issue presented. There is no evidence whatever in the record to justify the contention that the Commissioner of Indian Affairs departed from the strict terms of the contract in any way in not advancing stumpage prices to plaintiff's predecessors for the three-year period beginning April 1, 1924. The mere fact that the wholesale prices of lumber during the preceding three-year period were such that the Commissioner was authorized to advance stumpage prices for the period beginning April 1, 1924, had he seen fit to do so, does not show that his action in not making an increase was a concession to plaintiff not contemplated in the con-

tract. Many factors other than the wholesale price of lumber necessarily entered into the Commissioner's determination to increase or not to increase stumpage prices for the period beginning April 1, 1924. It must be assumed the Commissioner performed his duty in good faith and that his decision not to increase stumpage prices for the period was fully justified by the facts on which his determination was based. Furthermore, what the Commissioner may have done in 1924 is immaterial to the issue in this case. The contract divides the time in which the contract is to be performed into periods of three years each. Price adjustments are to be made in the same manner for each of the periods. The determination of the new rates to be fixed for each adjustment period "lie wholly within the discretion of the Commissioner of Indian Affairs" with the sole limitation that no increase shall be made in excess of 50% of the wholesale increase in the value of lumber during the preceding three-year period over the value of lumber during the designated three-year period preceding. Each three-year period stands on its own bottom, and the fact that the Commissioner in his discretion declines to make an increase in stumpage prices for a period when he had authority to do so has no relevancy whatever to the price adjustment made by him for any other three-year period provided in the contract. The contention, therefore, that the increased stumpage price of 40 cents per M feet, here involved, was a valid exercise of the discretion vested in the Commissioner of Indian Affairs by the contract, is not sustained.

The defendant further contends that the contract sued upon is not a contract with the United States within the meaning of section 145 of the Judicial Code, and that the suit is, therefore, not maintainable under the Court's general grant of jurisdiction. It is urged that in making the contract the defendant's officials were merely acting for the Indians in their behalf and for their interest, and that consequently there was no responsibility on the part of the defendant for the performance of the contract. In other words it is contended the contract is not a contract by the defendant but a contract of the Klamath Indians. The

contract recited it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians," and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as the "party of the first part" which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School "for the use and benefit of the Klamath Tribe of Indians" the value of the timber at prices fixed in the contract. But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them, it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it, and any contract made by them would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be merely a nullity. The contract was executed and approved by the officials of the defendant in strict accordance with the laws of the United States. Undoubtedly, the contract is a contract of the defendant within the meaning of section 145 of the Judicial Code.

From what has been said it follows that the plaintiff is entitled to recover. Judgment is therefore awarded the plaintiff in the sum of $44,772.62. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ALGOMA LUMBER COMPANY, A CORPORATION, v. THE UNITED STATES

[No. M-109. Decided January 12, 1938. Motion for new trial overruled May 2, 1938]

On the Proofs

Contract for purchase of timber on Indian Reservation; tribal contract; increase in price.—Decided on the authority of the Forest Lumber Company, herein, p. 188.

The Reporter's statement of the case:

Messrs. Carl D. Matz and *William S. Bennet* for the plaintiff. *Mr. Jesse Andrews* was on the briefs.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is now, and at all times hereinafter mentioned has been, a corporation organized under the laws of the State of California, with its principal place of business in Los Angeles, California.

2. On March 21, 1917, the Assistant Secretary of the Interior approved a form of contract and regulations, and also a form of advertisement, for the sale of about 250,-000,000 feet of pine (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir, upon approximately 15,700 acres, within Townships 31, 32, and 33 South, Range 7 East, on what is known as Middle Mount Scott Unit, Klamath Indian Reservation, Klamath, Oregon. The form of contract, as approved, provided that it would extend for a period of 15 years from April 1, 1917.

The advertisement required that sealed bids be addressed to the Superintendent of the Klamath Indian School, Klamath Agency, Oregon. Bids were received until 12 o'clock noon, on May 31, 1917. Each bidder was required to state in his bid, for each species, the amount per thousand feet, Scribner decimal C log scale, to be paid for all timber cut prior to April 1, 1920. The advertisement prescribed that

prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs, by three-year periods. Prospective bidders were informed that no bid less than $3.25 per M feet for yellow and sugar pine, or 50¢ for white fir, for the first period, would be considered. Bids were required to be submitted in triplicate, and accompanied by a certified check on a solvent national bank, in favor of the Superintendent of the Klamath Indian School, in the amount of $5,000.

3. On May 28, 1917, plaintiff, in response to the published invitation for bids, made its proposal, addressed to the Superintendent of the Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow and sugar pine at $3.57, and white fir at 50¢. A certified check in the sum of $5,000, drawn on the First National Bank of Los Angeles, California, payable to the Superintendent of the Klamath Indian School, accompanied the proposal.

In said proposal plaintiff stated:

> If our bid is accepted and we shall fail to fulfill our agreement in accordance with the regulations governing the sale, the amount of this check shall be forfeited to the use and benefit of the Klamath Indians.

4. Plaintiff's bid was the lower of the two bids received, and on June 4, 1917, the Special Agent in Charge of the Klamath Indian School forwarded to the Commissioner of Indian Affairs an abstract of the bids received, and recommended that plaintiff's bid be accepted. On June 25, 1917, the Assistant Secretary of the Interior approved the recommendation made by the Commissioner of Indian Affairs on June 16, 1917, that the bid of the Algoma Lumber Company be accepted, and on the same day advised the Special Agent in Charge of the Klamath Indian School, of the acceptance of plaintiff's bid, and directed him to prepare the contract and bond, and submit it to the Department. On June 25, 1917, plaintiff was advised of the acceptance of its bid, and that the Special Agent in Charge of the Klamath Indian School had been directed to prepare the contract and bond.

5. The contract was entered into July 28, 1917, and approved by the Assistant Secretary of the Interior on September 14, 1917.

The contract designated the parties thereto and the subject matter therof as follows:

TIMBER CONTRACT
MIDDLE MT. SCOTT UNIT
KLAMATH INDIAN RESERVATION

This agreement made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July 1917, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855–857), and the Regulations and instructions for Officers in charge of forests on Indian reservations, approved June 29th, 1911, as amended March 17th, 1917, between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and THE ALGOMA LUMBER COMPANY OF ALGOMA, STATE OF OREGON, party of the second part.

WITNESSETH: That the party of the first part, agrees to sell to the said Algoma Lumber Company, party of the second part, upon the terms and conditions herein stated, all the merchantable dead timber, standing or fallen, and all the live timber marked, or otherwise designated for cutting by the proper officer of the Indian Service, estimated to be approximately two hundred fifty million feet board measure log scale of pine timber (approximately ninety-five per cent yellow pine and five per cent sugar pine) and about ten million feet of white fir, located upon the designated area of approximately 15,700 acres as hereinafter described.

FOR AND IN CONSIDERATION OF THE foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

For the period ending March 31, 1920, Three Dollars and fifty-seven cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine and Fifty cents per thousand feet board measure for white fir.

For the three year periods of the contract term, beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lumber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920; February 1, 1923; February 1, 1926; February 1, 1929.

It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

As a basis of comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents ($15.75) for yellow pine (including bull pine and sugar pine), and Thirteen Dollars and Fifty cents ($13.50) for white fir.

* * * * * * *

The contract also contained the following provisions:

2. The sale includes an area of approximately 15,700 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown

Reporter's Statement of the Case

on the attached map, which is made a part of this contract, and are further described as follows:

* * * * *

The sale area includes 14 allotments comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted land.

3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

4. The timber will be paid for in advance payments of not less than $10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than $2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

* * * * *

23. The purchaser will pay for damage to property of the Indians growing out of his operations under the sale. The purchaser shall comply with all Regulations relative to the maintenance of order on Indian reservations. Indian labor shall be employed in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

24. The title to the timber covered by the contract shall not pass to the purchaser until it has been paid for and scaled, measured, or counted.

25. All questions relative to the location of railroad spurs, the exact areas to be logged, the location of all structures and the requirements to be observed in their construction and other matters concerned with the operations of the purchaser upon the sale area, shall be settled by the officer in charge. Final decisions as to points involved in the interpretation of the Regulations and provisions of the contract governing the sale, cutting, and removal of the timber shall be rendered by the Secretary of the Interior. Work may be suspended by the officer in charge if the terms of the contract are disregarded, and the violation of any one of such terms, if persisted in, shall be sufficient cause for the revocation of the contract and the cancellation of other permits and privileges.

26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

28. All books pertaining to the logging operations and the milling business of the purchaser will be open to inspection at any time by an officer authorized by the Commissioner of Indian Affairs to make such inspection with the understanding and agreement that any information obtained through such inspection shall be considered confidential and, without the consent of the purchaser, shall not be disclosed to anyone except those connected with the Government service.

* * * * *

30. As a further guarantee of a faithful performance of this contract the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of forty thousand dollars ($40,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder.

6. A penal bond in the sum of $40,000, executed by individual sureties, was furnished by plaintiff on December 21, 1917, to guarantee the performance of the contract. By the

terms of said bond the individual sureties obligated themselves to pay to the United States the penal sum therein named, on condition that the obligation of the bond would be inoperative in the event that plaintiff faithfully observed all the laws and regulations made for the governing of trade and intercourse with the Indians, and complied with the regulations and terms of the contract.

7. The regulations, approved June 29, 1911, as amended March 17, 1917, prescribed in detail the procedure to be followed in the administration of the sale of timber on Indian reservations. The declared purpose of the regulations was to so manage "the Indian forests as to obtain the greatest revenue for the Indians consistent with the proper protection and improvement of the forests."

Section 17 of the regulations prescribed that sales, involving a stumpage value of not exceeding $50,000, might be made from unallotted land, by the Commissioner of Indian Affairs, or from allotments, with his approval. Sales involving a stumpage value exceeding $50,000, should be made only with the express approval of the Secretary of the Interior.

Paragraph 23 of the amended regulations, approved March 17, 1917, provided in substance for the deduction of 8% of the gross proceeds derived from the sale of timber. This sum of 8% was deducted for the purpose of defraying the administrative expenses incidental to the sale of timber and was considered in the Superintendent's cash account as "Individual Indian Money Timber Expense." The remaining 92% was paid to the allottee, or his heirs, or deposited to the credit of the parties entitled thereto, as required by said regulations.

8. The first adjustment period under the contract commenced on April 1, 1920.

The contract required that notice of the new schedules be determined and given to the purchaser on or before February 1, 1920. In order for the Commissioner to determine the new schedule and give the notice required on February 1 of each year of the price adjustment period specified in the contract, it was necessary for plaintiff, and

other timber operators, whose contracts were subject to the same price adjustment schedule, to furnish the Commissioner with data respecting cost of production and selling prices for the three years preceding January 1 of each year in which such new schedule of prices was fixed. Plaintiff experienced some delay in furnishing the required cost and sales price data, and as early as January 23, 1920, advised the Commissioner that it had intended asking for a revision downward, on account of the grades running lower than he had originally estimated and represented.

On March 29, 1920, the Commissioner wired plaintiff as follows:

> Reconsideration of all data submitted by you and others confirms view expressed in office wire of February nineteenth that advance of sixty-seven cents per thousand feet on Mount Scott Unit is justifiable, effective April one, nineteen twenty. Should investigation at close of nineteen twenty convince me that this price is too high, reduction may be made for nineteen twenty-one and nineteen twenty-two.

On March 30, 1920, plaintiff replied, by letter, to the Commissioner's wire, advising him that it was prepared to accept the advance of 67¢; that its greatest objection was not that the increase did not seem to be justified by present conditions, but that the United States Forest Service had made no increase on March 1, 1920, on a timber unit very close to the one operated by plaintiff, that contractor being its largest competitor in the District. The second paragraph of said letter stated:

> We note that you are prepared to make a reduction for 1921–1922 should an investigation at the close of 1920 convince you that the price is too high, and we wish to thank you for this promise of additional concession should conditions warrant.

On April 5, 1920, the Commissioner addressed a letter to the Superintendent of the Klamath Indian School, advising of the 67¢ increase on the Middle and Southern Mount Scott Units, effective April 1, 1920, and stating that the decision had been reached after a full consideration of all

information presented by the Algoma and Lamm Lumber Companies, and by the Superintendent and Forestry employees specifically detailed to gather information respecting the cost of production and selling prices during the years 1916 and 1919, inclusive; that while the data indicated that there had been a very marked increase in selling prices during the years 1917, 1918, and 1919 over the average price prevailing in 1916, it also showed a very large increase in the cost of production, and that the 67¢ increase, effective April 1, 1920, was based upon calculations that gave the companies credit for the full amount of the advance in production costs during 1917, 1918, and 1919, over the average production cost for 1916. The Superintendent was requested to have made, by timber men specially detailed for that purpose, a thorough study of production costs and lumber prices in the Klamath Region during the year 1920, for the purpose of determining whether the increase in the stumpage prices should be applicable during the years 1920 and 1921.

9. The second price adjustment period under the contract commenced on April 1, 1923.

On December 22, 1922, Mr. Lee Muck, Supervisor of Forests, was directed to proceed to the Klamath Indian Reservation, early in January, for the purpose of making a thorough study of the situation and recommending what increases, if any, should be made in the stumpage prices during the three years following April 1, 1923, in the Middle Mount Scott Unit, under the terms of the contract, to properly protect the interests of the Indians.

On January 3, 1923, the Commissioner advised plaintiff by letter that Mr. Muck had been assigned to make a special study of lumber costs and prices in the Klamath District. Plaintiff was asked to cooperate with the Department's representative, in order that the Commissioner might be in a position to determine, with fairness to all parties, what advances in stumpage prices, if any, should be made on April 1, 1923. Plaintiff was asked to notify the Commissioner not later than January 15, 1923, whether it would waive its right under the contract to receive notice

of the proposed readjustment of prices prior to February 2, 1923, and allow until March 1, 1923, for such notice. The request for additional time was made because of the apparent inability of the plaintiff and other operators to furnish complete data for the calendar year 1922, until late in January.

On January 8, 1923, plaintiff advised the Commissioner of its waiver to receive said notice until March 1, 1923, and expressed the opinion that present conditions did not warrant any increase in prices, in view of the heavy increase which was made three years before, and the fact that the margin of profit had decreased rather than increased during the last three years.

As required by the terms of the contract, the Commissioner, on February 27, 1923, advised plaintiff, by telegram, that he had concluded that the stumpage rate for pine on Middle Mount Scott Unit should be increased 66¢ on April 1, 1923, making the new contract price $4.90 per M feet, and that the price of white fir should be increased 25¢, making the price for that species 75¢ after April 1, 1923.

On February 28, 1923, the plaintiff, by telegram to the Commissioner, protested said advance, and asked for a rehearing, stating that it could not see how the rise in price was justified either by the experience of the past three years, or by the prospects for the next three years, although the then present market was temporarily very high. On March 1, 1923, the Commissioner advised the plaintiff that he would be pleased to consider any information or argument that plaintiff might present to him prior to April 1, 1923.

On March 24, 1923, plaintiff addressed a letter to the Commissioner, referring to its previous protest respecting the proposed 66¢ rise in price on Middle Mount Scott Unit, and advised that, after looking into the matter more carefully, it wished to withdraw its protest provided it could obtain an understanding that the matter would be reviewed on or about the first of April 1924, or 1925, in case the market dropped to such an extent that the recent rise would work a great hardship upon it. The plaintiff stated that it felt that deflation, common to nearly all industries,

was coming to the lumber industry, and that the last two heavy advances in the price of stumpage might make the operation of its unit extremely unprofitable. The plaintiff stated that a further reason for the protest made by it was that competing companies operating close to the Middle Mount Scott Unit on timber units controlled by the United States Forest Service had obtained stumpage prices more advantageous than those obtained by plaintiff. It stated, however, that as compared with other units on the Klamath Reservation, it had not been treated unfairly and that it might be possible, at the present rather inflated values in the lumber business, to make a reasonable profit at the new stumpage prices, provided such prices continue for a sufficient length of time.

On April 5, 1923, the Commissioner acknowledged the receipt of plaintiff's letter of March 24, 1923, and stated that the office understood plaintiff's letter to mean that it considered the advanced price of $4.90 per M feet for yellow and sugar pine to be satisfactory on the basis of the market that had existed during the preceding three years; that plaintiff would ask reconsideration only on condition that there should occur thereafter such a marked decline in lumber values as to make the company's operation an unprofitable one, on the basis of the then existing stumpage price; that reference to the two dates, April 1, 1924, and April 1, 1925, was taken to mean that plaintiff might desire a revision downward of the price effective April 1, 1924, if there should occur a very marked decline of lumber prices during the year beginning April 1, 1923; and that should a serious depression occur during the year beginning April 1, 1924, plaintiff would expect the price to be lowered during the year beginning April 1, 1925. The Commissioner, in said letter, advised plaintiff that he considered its position a reasonable one and that he would be pleased to give consideration to the whole problem if conditions during the years beginning April 1, 1923, and April 1, 1924, disclosed that the new price of $4.90 per M feet was an unreasonable one.

The Commissioner, in said letter, also advised plaintiff of

his appreciation of its attitude at the time of the former readjustment, and also at the present one, and stated that:

> The purpose of the office in increasing stumpage prices has consistently been that of securing to the Indians every advantage to which they are justly entitled under the terms of the contract, and at the same time giving the fullest consideration to the legitimate interests of the purchaser of the timber. The office understands fully the uncertainty involved in the management of an operation so extensive as that of the Algoma Lumber Company and is desirous to maintain at all times a sympathetic interest in the success of those who are assisting in the realization of adequate prices for Indian timber.

10. The third price adjustment period provided by the contract commenced on April 1, 1926.

On December 22, 1925, the Commissioner advised plaintiff that his office had been unable to obtain, in sufficient time, the information from the plaintiff and other operators on Klamath lands, upon which the readjustment should be based to make a final determination of the readjusted prices prior to February 1 of any year in which the adjustment was to be made. Plaintiff was asked if it would consent to such notice being given on February 28, 1926.

By letter to the Commissioner dated January 2, 1926, the plaintiff consented to the requested extension of time. The letter contained the following statement:

> As rapidly as possible we will get our own records in such shape that you will have our results for the past year and we believe we have already furnished you our results for the years 1923 and 1924. These results are such that certainly no increase in prices can be made without subjecting us to further severe losses unless lumber prices for the next three years should greatly exceed those of the past three years, and this latter condition seems unlikely in view of the most reliable forecast concerning general building prospects for the future.

On February 24, 1926, Mr. Grant, plaintiff's secretary and manager, addressed a letter to the Commissioner, confirming a conversation that he had with the Commissioner and Mr. Kinney, advising that plaintiff was unable to stand any advance in stumpage price under its contract for the

next three-year period; that the company made practically nothing on its investment during the past two years owing to low prices occasioned by general overproduction of lumber, notwithstanding that during those years there had been the greatest demand ever known for lumber; and that future prospects indicated a decreased demand for lumber and lower prices. The letter also stated:

> Also we would call your attention to the fact that our timber was purchased at $3.53 per M under a contract, the intent of which, we believe, was to divide the prospective advance in timber values between the Indians and ourselves, so that our present price of $4.90 shows an advance over initial price of $1.37. This $1.37 is one-half of $2.74 which, added to our original price of $3.53, would give a value of $6.27 before any further advance would be warranted under this theory.

Mr. Grant also called attention to the fact that the remaining timber on the unit was far below the average quality, and that the company could not expect to make the sales returns which it had been averaging under as good market conditions as had existed; that his company had an investment at Algoma in its mill, railroad, and logging equipment of over $1,000,000; that in view of the great risks of the business, his company had hoped that its investment might net 12%, or $120,000 annually, or $3.00 per M on an estimated cut of 40,000,000 feet; that he believed his company was faced with the prospect of a net loss, even if stumpage prices were not raised.

On February 26, 1926, the Commissioner addressed the following telegram to the Superintendent of the Klamath Reservation:

> Advise Algoma and Lamm Lumber Companies there will be no increase in stumpage prices on April first.

On February 27, 1926, the Commissioner replied to plaintiff's letter of February 24, 1926, and advised that prior to receiving the company's letter,

> * * * final consideration had been given to the question of whether an increase of the price would be justified in view of market conditions and the terms of your contract for the purchase of this timber, and the Com-

missioner had instructed Superintendent Arnold of the Klamath Indian Reservation to advise your company that no increase would be made in the prices of the various species on April 1, 1926.

On December 7, 1926, plaintiff addressed a letter to the Superintendent of the Klamath Indian Agency, confirming a conversation with the Superintendent and Mr. Kinney, requesting permission to reduce the minimum to be cut from its reservation units during 1927 to 15,000,000 feet. This request was made for the reason that plaintiff had suffered a serious fire in one of its timber units during 1926.

On February 26, 1927, the Commissioner addressed the following wire to the Superintendent of the Klamath Indian Reservation:

> Advise Algoma Lumber Company and Lamm Lumber ber Company that prices of stumpage on Middle Mount Scott and Southern Mount Scott Units will not be increased April first nineteen twenty seven.

On the same day, namely, February 26, 1927, the Commissioner addressed the following telegram to plaintiff:

> The price of stumpage on Middle Mount Scott Unit will not be increased April first nineteen twenty seven.

On March 18, 1927, plaintiff addressed the following letter to the Commissioner:

> We are in receipt of a wire from you advising that the price of stumpage on Middle Mount Scott Unit in the Klamath Indian Reservation would not be increased April 1, 1927. We are a little puzzled by this wire, as our price was fixed a year ago for the three years next succeeding.

On March 30th, the Commissioner replied to the plaintiff's letter of October 18th, stating in the second and third paragraphs thereof as follows:

> April 1, 1926, was the regular period for the increase of stumpage prices on this unit. Because of unfavorable market conditions this Office did not think it advisable to increase the prices at that time and so advised you by letter of February 27, 1926. It was hoped at that time that there would be a substantial improvement in conditions prior to April 1, 1927. However, conditions have been such during the past year and the

> outlook for increased lumber prices during the year beginning April 1, 1927, is such that the Office thought it inadvisable to require any increase in price effective April 1, 1927, for the remaining two years of the three-year period.
>
> Should the market during the year 1927 be such that the Office shall feel at the close of the year that the deferred increase in stumpage prices may fairly be made, you will be advised prior to February 1, 1928, unless you should kindly consent as you have heretofore done, to leave this question open for an additional month.

On April 20, 1927, plaintiff acknowledged the receipt of the Commissioner's letter of March 30, 1927, and stated that the Commissioner's letter of February 27, 1926, made no reservation that the decision would hold for one year only and that under its contract prices were to be fixed for three years at that time, and it assumed that the prices made by the Commissioner's letter of February 27, 1926, would hold for three years, and that it had planned accordingly. Plaintiff also stated in its letter that it would like the Commissioner to confirm these prices for the remaining two years of the three-year period, and stated that the Commissioner apparently did confirm these prices in the second paragraph of his letter of March 30th, but with a reservation in the third paragraph.

On April 27, 1927, the Commissioner replied to plaintiff's letter of April 20, 1927, and stated that he did not understand how the plaintiff interpreted the second paragraph of the Commissioner's letter of March 30, 1927, to mean that there would be no rise on the Middle Mount Scott Unit until April 1, 1929; that the third paragraph of that letter made it clear that there might be an increase on April 1, 1928, which would apply to only one year. He also stated therein that he felt that plaintiff had been very fairly treated in the matter of stumpage price readjustments, and that if there should be an improvement in market conditions during the present year plaintiff could not reasonably object to an increase during the last year of the then present three-year period; that the plaintiff should recognize that the Commissioner had given full consideration to the depressed market conditions that had prevailed during the preceding

two years, and that the increases made at the time of the first and second readjustments were much smaller than might have been made under the terms of the contract.

On May 6, 1927, plaintiff replied to the Commissioner's letter of April 27, and said that its contract provided that an increase could be made every three years if conditions warranted, and that such price should hold for the succeeding three years; that it had assumed that the price fixed by the Commissioner in 1926 would hold for the next three-year period, inasmuch as the Commissioner made no reservation at that time; that it was disappointed to note that the Commissioner wished to reserve the right to change the stumpage price on April 1, 1928; that lumber prices at the present time indicated that there would be little, if any, profit in the business for the current year.

On November 30, 1927, the Chief Supervisor of Forests addressed a letter to Mr. E. J. Grant, manager of the plaintiff, containing in its two final paragraphs the following:

> I, and all associated with me in the Forestry Branch of the Indian Service, feel very strongly that the price of $4.90 now being paid for stumpage on the Middle Mt. Scott Unit is considerably more than $1.00 below the stumpage value of that timber as indicated by all sales made during the past six years. After a very liberal discount of the price on all recent sales, on the ground that sharp competition has advanced the price beyond the conservative market value of the same for a satisfactory profitable manufacturing process, we cannot escape the conclusion that the present stumpage price on the Middle Mt. Scott Unit is too low.
>
> Irrespective of the present weakness of the lumber market, I have decided definitely that I must recommend an increase in price on the said Unit effective April 1, 1928. I have not yet reached a conclusion as to the exact amount of the increase that I should recommend, in view of the present state of the market. As indicated above, all of us know that when comparison is made with all units sold on Klamath Reservation subsequent to 1923 the timber on the Middle Mt. Scott Unit should carry a stumpage charge in excess of $6.00. However, we are disposed to give the fullest consideration to the fact that said unit was sold in 1917 and to concede that the advance in price

on April 1, 1928, should be conservative. Argument to the effect that no increase should be made on April 1, 1928, would be fruitless, but it is quite possible that the amount of the increase could be established by agreement, and I believe it would be entirely proper for you to suggest the increase that you feel would be fair to the Indians and not burdensome to the Algoma Lumber Company.

On December 31, 1927, plaintiff replied to the letter of November 30, 1927, and after referring to the unsatisfactory conditions that had prevailed in the lumber business during the past year, expressed the view that the industry was facing further depressed conditions during 1928 and probably 1929. It stated that profit on its operations during 1927 was estimated at only $35,000; that it had considerably over $1,000,000 invested in plant and equipment and that it believed that owing to the unusual fire hazards it was entitled to a profit of 12% to 15% on its investment in equipment; that certain of its competitors were about to liquidate their investment in timber holdings, and that the Indian Service also was about to offer for sale several large tracts, to prevent further beetle damage, notwithstanding the prospects of a decreased demand for lumber; that in view of such conditions, it had hoped that the Supervisor might consider a decrease in the stumpage price; that it could not see the reasonableness of an increase, and could not understand why the Supervisor should consider a price increase in a year when, apparently, under the contract there was no legal right to increase the price, because the contract provided for prices to be changed only at three-year intervals, and the next price change period would be 1929; that unless conditions changed greatly prior to the spring of 1929, it could see no reason for a change, except downward, at that time.

11. On January 17, 1928, the Chief Supervisor of Forests addressed a letter to the Commissioner of Indian Affairs respecting the readjustment of stumpage prices on April 1, 1928, on several units of the Klamath Reservation. The Supervisor advised the Commissioner that on April 1, 1926, an adjustment of price was considered only for two units, namely, the Middle Mount Scott (Algoma Lumber Com-

pany) and Southern Mount Scott (Lamm Lumber Company); that because of the declining lumber market it was not possible to raise the price on these units if only the years 1923, 1924, 1925 were considered; that because of poor market conditions prevailing early in 1926, the office advised both the Algoma Lumber Company and the Lamm Lumber Company that no rise in price would be made on April 1, 1926; that in the early part of 1927 market prospects had been again poor and both companies had been again advised that no increase would be made on April 1, 1927; that the stumpage prices on contracts affecting five other units were also subject to adjustment on April 1, 1927; that with respect to these units no increase had been made in 1924 because of high initial prices and unsound conditions on several of these units; that no increases having been made in 1924, and competitive bidding on other units having indicated a marked rise in stumpage prices, notice was given in March 1927 to all of those companies of an increase of $1.00 in price, but said increase was omitted for the year beginning April 1, 1927; that the Algoma Lumber Company and the Lamm Lumber Company were both advised by him, when he was at Klamath, that he felt the price on both units should be raised on April 1, 1928; that both companies protested, but that he had no hesitation in saying that a rise of $2.00 per M feet would not have made their prices comparable to the prices to be paid by several other companies after April 1, 1928; that he believed that some of the other companies had paid more than the timber was really worth and for that reason had never suggested a $2.00 increase. He further stated that he had suggested a rise of $1.00 per M feet and felt confident that the timber on both the Middle Mount Scott and Southern Mount Scott Units had a then present actual stumpage value, even on a weak market, more than $1.00 greater than the prices that were then being paid; that after giving full consideration to existing conditions he had concluded that the price on both units should be increased the same amount as the other units, namely, 56¢, effective April 1, 1928. He further suggested that in May 1926 three Klamath units sold for $7.29, $7.84, and $8.00; that these prices seemed to all timber men in the Indian

Service to show that the Algoma and Lamm units were each worth at least $6.00 per M, after making allowances for the unusually sharp competition in prices received in the latter sales; that when the time came for notice of readjustment early in 1927, the lumber market was in a deplorable condition and another "year of grace" was given the Algoma and Lamm Companies. The Supervisor further stated that he felt the price to the Algoma Lumber Company and the Lamm Lumber Company should be increased at least 56¢ on April 1, 1928; that while he had considered fully the claim made by these companies that the Commissioner was "estopped" from increasing the price on April 1, 1928, because of his failure to make such increase on April 1, 1926, he did not feel that the language of the contracts should be construed in that manner, inasmuch as both companies in 1920, and again in 1923, asked and urged that the strict terms of the contracts be set aside so that their interests might be given equitable consideration; that this was done, and to all practical purposes a new basis of adjustment, namely, one of reappraisal, was adopted. The Supervisor of Forests and the Superintendent of the Klamath Reservation also signed the letter as agreeing with the statements of fact and conclusions of the Chief Supervisor of Forests.

On January 20, 1928, the Commissioner addressed a letter to plaintiff in which he reviewed the facts respecting his action under the contract with respect to the readjustment of prices on April 1, 1920, and again on April 1, 1923. With respect to the first adjustment date, namely, April 1, 1920, the Commissioner stated that the stumpage price of yellow pine was increased 67¢, or from $3.57 per M feet to $4.24; that the record showed clearly that under a strict interpretation of the terms of the contract the increase in price might have been more than equal to the original purchase price; that the small increase in price that was made was fixed after careful consideration had been given to all circumstances connected with the case, including a consideration of all increased costs of production; that the justification of the increase was demonstrated by reports filed by plaintiff with the Commissioner showing that plaintiff's profits during the years 1920, 1921, and 1922 had been twice

the amount ordinarily to be expected in the lumber manufacturing business; that the increase of 66¢ in the stumpage price of yellow pine made under the contract, effective April 1, 1923, was but little more than 1/6 of the net increase in the margin of profit realized generally in the Klamath District during the three years 1920, 1921, and 1922 over the average prices realized in 1917, 1918, and 1919; that the only justification for such a small increase in the stumpage price increase, representing such a small fraction of the increase in margin of profit that could be consistently urged by the plaintiff or that could be conceded by the Service, was on the theory that the increased prices received during 1920, 1921, and 1922 could not be obtained during the succeeding three years, and that such increased prices had not been accompanied by a corresponding increase in stumpage values. In his letter the Commissioner also stated:

> At that time, as well as at the earlier adjustment, you urged that the provisions of the contract of purchase be not strictly enforced but that sympathetic consideration be given to the probabilities of greatly reduced prices in the future and that the indicated rise in stumpage be strongly discounted. It was in a spirit of cooperative fairness and a desire not to impose any burdensome stumpage prices upon your company that the small increase of 66¢ per M feet was established, making your new price only $4.90 whereas other units of unquestionably lesser value had already been sold in the competitive market for more than $5.00.

The Commissioner further stated that subsequent sales in 1924, of less desirable units for $4.78, $5.53, $5.72, and $6.67, indicated that the Service had not realized how much stumpage values had risen, and also, that the prices for manufactured products obtained by plaintiff during the years 1923, 1924, and 1925, demonstrated that plaintiff's predictions and the estimates made by the Service early in 1923, as to the future, had not been sound; that it was the general opinion of all Forestry representatives of the Service familiar with the Klamath situation, that the stumpage price under plaintiff's contract should be increased on April 1, 1926; that market prospects for 1926 had been so unsatisfactory that the office advised plaintiff that no increase

would be made on April 1, 1926; that similar market conditions prevailing early in 1927, resulted in a similar decision not to consider an increase on April 1, 1927; that on April 1, 1928, automatic increases became effective on several Klamath units, and increases imposed on other units on April 1, 1927, also became effective; that on most of these units the price of yellow pine, subsequent to March 31, 1928, would be above $6.00 per M feet, and on five units, none of which had an operative value equal to plaintiff's unit, the price would be above $7.25 per M feet; that under the circumstances there was a very positive feeling in the Service that a large increase on plaintiff's unit was fully justified. The Commissioner further stated:

> However, I am informed as to your contention that an increase on April 1, 1928, cannot legally be enforced. While I believe you wholly unjustified in raising this technicality, in view of the equitable treatment that has heretofore been accorded your company, I am quite ready to admit that the imposition of an increase without your consent would be open to criticism as an arbitrary exercise of discretion and might even be subject to attack on the ground of illegality.
>
> Under such circumstances I wish to inquire whether you will not voluntarily agree to an increase of 56¢ per M feet in the price of yellow pine cut from the Middle Mount Scott Unit during the year beginning April 1, 1928? I assure you that it is the opinion of all forestry men in the Indian Service who are familiar with the Klamath situation that an increase of $1.12 on this unit, making the price $6.02, would not equal its value as compared with other units now being operated, but in view of the existing doubt as to the authority of this office to increase the price at its discretion, I would consider a compromise agreement on a raise of 56¢, making your price for the coming year $5.45 per M as a satisfactory adjustment.
>
> I recognize fully your duty to safeguard the interests of your company. I hope you will recognize my duty of protecting the interests of the Klamath Indians and I trust that you will not overlook the consideration which this Service has heretofore given your company in construing the terms of the contract equitably rather than strictly.

On January 30, 1928, the Commissioner addressed the following telegram to the plaintiff:

> Please wire today whether you accept suggested compromise of fifty six cents increased price Klamath timber.

On January 30, 1928, plaintiff addressed the following telegram to the Commissioner:

> Yours thirtieth our loss last year on Middle Mount Scott operations was five thousand exclusive of any interest on our own or borrowed capital stop We would like to have time to present these reports and also have you give consideration to reports of other operators to determine if our operation is inefficient stop Market conditions are more unfavorable now than a year ago we wish to waive for this year any right we might have to insist upon a price determination by February first and extend time to April first.

On January 30, 1928, plaintiff replied, by letter, to the Commissioner's letter of January 20, and stated, in substance, that it did not wish to take an arbitrary stand in the matter, and hoped the Commissioner would examine into the question of plaintiff's profit for the past year, and also compare its efficiency with other operators in the District. In its letter plaintiff stated, among other things:

> We went into the Middle Mount Scott Unit as the first large sale which was made of Klamath Indian Reservation timber, and in effect, the contract reads that the advance in the price of lumber, taking into account changes in operation cost, is to be divided between the Indians and ourselves. At our present stumpage price you are now giving the Indian Reservation $1.37 above the bid price on every thousand feet of timber which we cut. This presupposes that the present market and labor conditions will return to us an increased profit of $1.37 over market and labor conditions such as existed in 1917, the year in which we purchased this Unit. Instead of this, we maintain that our profit has been entirely cut out by the advances already made, and we think it an injustice that you should consider further advances until conditions have considerably improved. The fact that there has developed during the past few years a temporary shortage of timber in the Klamath section, and that some

mills have bid very exorbitant prices for it, and are no doubt protesting against our low prices, should not be a factor in penalizing us. There is certainly nothing in our contract which suggests any equalizing of our stumpage prices with any which others may be paying or bidding. We are of the opinion that all of the operators paying $6.00 per thousand or over for stumpage in the Klamath Indian Reservation will be in the hands of their creditors within a very few years, as the price is a false and artificial one which seemed warranted by conditions of several years ago, but is certainly not warranted by the conditions of to-day.

Plaintiff acknowledged that it had made a very good profit in some of the past years, under the contract, but stated that this profit had largely been put back into plant improvements at Algoma to reduce costs; the letter also referred to plaintiff's Antelope timber purchase; it stated that on top of these plant expenditures, the company had suffered losses on account of two forest fires, and also the burning of its Montague Plant. In its letter plaintiff said:

> We make mention of these facts to show the risks involved in the lumber business and to further show that we are not in a position to pay the Indians a price for their timber beyond that at which we are able to make a profit.

On March 14, 1928, plaintiff addressed a letter to the Commissioner, referring to its telegram and letter of January 30, and stated that it would like to extend to May 1 the time for determining the price readjustment; that the lumber business was in very bad shape, and until conditions improved it could not pay a higher price and conduct its business at a profit; and that such a condition would be extremely unfair to it.

On March 23, 1928, the Commissioner advised plaintiff, by letter, that it was expected that final determination as to the price adjustment on the Middle Mount Scott Unit would be reached before April 1, 1928; that since the contracts provided for all changes in prices on April 1, it did not appear advisable to delay the decision until May 1, as suggested.

On March 24, 1928, the Commissioner addressed the following telegram to plaintiff:

> Decision reached increase price Middle Mount Scott Unit Forty Cents effective April first period. Hope you will recognize entire fairness this increase.

On March 26, 1928, plaintiff replied to the Commissioner's telegram of March 24, and stated that it felt that the rise was unwarranted and unfair at that time, under the rights given to it by its contract. In the final paragraph of its letter plaintiff asked:

> If we decide to accept this increase without further complaint, may we have your assurance that no increase in price will be made on our unit next season, and that consideration will be given to a reduction in price in case we make no profit this year with operating efficiency as good as the average in the Klamath Falls District?

On April 4, 1928, the Commissioner replied to plaintiff's letter of March 26, 1928, and stated that he would hesitate to even suggest that plaintiff's operation was inefficient, as compared with other operators in the Klamath Region, but that a reply to plaintiff's inquiry necessitated the observation that the profit shown on financial and operating statements submitted by the Algoma Lumber Company had generally been substantially below that shown by other companies operating in the Klamath Basin, and that this was true also of reports for the year 1927; that in view of the fact that the operating value of the Middle Mount Scott Unit had universally been considered as among the three or four highest units on the Klamath Reservation, while the stumpage price thereon ranked as one of the four lowest, the office was forced to conclude that either the efficiency of plaintiff's organization was somewhat less than that of those showing better results, or that plaintiff's system of accounting was such that it did not show results to be as favorable as they actually were. The Commissioner advised plaintiff that he could not at that time assure it definitely that there would be no increase on April 1, 1929, but that should the major part of plaintiff's logging operations be conducted on the Middle Mount Scott Unit during 1928,

and yet with average operating efficiency plaintiff should realize no profit, the office would not decline to consider an application for a reduction in price, but that in view of all the circumstances it did not appear probable that any reduction could be made on April 1, 1929. The Commissioner also said that the increase in price, effective April 1, 1928, was considered in the light of an adjustment of stumpage value to date,

> * * * and while the office feels that the new price of $5.30 does not represent the full value of the Middle Mount Scott stumpage on a competitive market basis, it concedes that this new price partakes of the nature of a compromise as to the increase that may be imposed on the basis of market prices to the end of the year 1925, and any increase that may be imposed on April 1, 1929, will be based upon the market during 1926, 1927, and 1928, as compared with that for 1923, 1924, and 1925.

12. On April 4, 1928, plaintiff addressed a telegram to Senator Frederick Steiwer, requesting that its name be added to the list of Klamath operators affected by the increase of 40¢ in the stumpage price being made by the Indian Bureau; that it considered the increase very unfair and hoped that a reconsideration of the matter might be obtained.

On April 7, the Commissioner replied to the Senator's letter of April 5, and advised that he had carefully considered the Senator's presentation of a telegram from the Algoma Lumber Company with respect to the 40¢ increase in stumpage price effective April 1, 1928, and that

> A careful review of this case convinces me that the action that was taken was proper under the circumstances and I do not feel that I would be justified in the cancellation of the increases.

On April 18, 1928, the plaintiff replied to the Commissioner's letter of April 4, 1928, and reiterated its belief that the advance in stumpage price recently made was both unfair and not legally justified under the rights given to the Commissioner by the Middle Mount Scott contract. The plaintiff inquired whether the Commissioner would be an-

tagonized by a friendly suit at law to determine the legality of his action in making the advance. The final paragraph of the plaintiff's letter was as follows:

> We note that no bids at all were received on the last two units offered by the Klamath Indian Reservation although prices were around $5.00 per M feet, and many mills in this district are desperately in need of additional stumpage. Is this not sufficient proof to you that the lumber business is not in the prosperous condition which you seem to assume?

On May 2, 1928, the Commissioner replied to plaintiff's letter of April 18, 1928, and assured plaintiff that any appeal it might wish to pursue in regard to the reappraisement of the Middle Mount Scott Unit stumpage would not prejudice the friendly relations now existing between his office and plaintiff company. The Commissioner further stated, in reply to an inquiry made by plaintiff in its letter, that he could see no connection between the stumpage price readjustment of the Middle Mount Scott Unit, and the lack of bids on two badly insect-infested units located on the east boundary of the Klamath, requiring very large developing expenditures; and called the plaintiff's attention to the fact that the proposed contract for those two units required the cutting and removal of 25,000,000 feet of timber prior to March 31, 1929, and that the purpose of that provision, and the decision to offer the units in the first place was to effect, if possible, beetle control on the Klamath.

On September 29, 1928, plaintiff addressed a letter to the Commissioner protesting the 40¢ increase in the stumpage price under its Middle Mount Scott Unit contract, effective April 1, 1928, and served notice that the cash advances paid by it to the Superintendent of the Klamath Reservation, under the terms of its contract, should not be applied at a rate greater than $4.90 per thousand feet for yellow pine, sugar pine, and incense cedar; that said protest was a continuing one, and if payments were made, except as directed in its notice, plaintiff would seek to recover from the Government the amount of the excess so paid.

On October 8, 1928, the Commissioner referred plaintiff's letter of protest to the Chief Supervisor of Forests, and

the Forest Valuation Engineer, for report and recommendation. On October 29, 1928, these persons advised the Commissioner, by letter, that in their judgment the increase of 40¢ per thousand was very conservative; that the Unit was a very desirable one, having a cut per acre of 20,000 feet B. M., as compared with 15,000 feet B. M. for the average area on the Reservation; that the increased price paid by plaintiff was one of the lowest in effect in that competitive field; that the action taken was supported by the favorable trend of the market since April 1, 1928; and recommended that no further action be taken in the matter in view of the very favorable consideration given to plaintiff in connection with the revaluation made effective April 1, 1928.

On November 9, 1928, the Commissioner acknowledged the receipt of plaintiff's letter of September 29, 1928, protesting the 40¢ price increase made effective April 1, 1928, and advised that he had given careful consideration to the matter presented, and was still of the opinion that the increase in price of 40¢ per M on the Middle Mount Scott Unit, effective April 1, 1928, was fully justified.

13. In the Klamath District, the income from the industry as a whole, that is, of those corporations operating on the Klamath Indian Reservation, was for the period 1923 to 1929, inclusive, as follows:

Year:	*Net Income*
1923	$345, 452. 89
1924	292, 574. 55
1925	648, 519. 12
1926	501, 019. 90
1927	37, 798. 03
1928	461, 566. 42
1929	118, 552. 67

This income reflected a return on the investment (net worth) of the following:

	Percentage
1923	9. 7
1924	5. 4
1925	10. 8
1926	5. 0
1927	0. 36
1928	3. 9
1929	1. 3

14. The fourth price adjustment period under the contract commenced on April 1, 1929.

On January 21, 1929, the Commissioner, by letter, requested plaintiff to consent to the receipt of notice relating to the price adjustment under the contract any time prior to April 1, 1929. The letter stated that this request was made because of the delay on the part of the plaintiff and other companies in furnishing information as to sales and costs in sufficient time to enable the Commissioner to determine what price adjustment, if any, should be made under the contract.

The Commissioner in his letter advised plaintiff that his information indicated that the prices to be paid after March 31, 1929, should be the same as then prevailing under the contract, namely, $5.30 per thousand feet for yellow and sugar pine, and the same prices then being paid for other species, but that if cost and sales data to be obtained from the various Klamath operators should indicate that higher prices should be fixed for any of the species, plaintiff would be afforded an opportunity to show why no such price increase should be made effective. Plaintiff, on January 30, 1929, advised the Commissioner that it consented to the receipt of the required notice for April 1, 1929.

On February 12, 1929, the Superintendent of the Klamath Reservation advised the Commissioner that he had received financial statements from the Forest Lumber Company, Chiloquin Lumber Company, Ewauna Box Company, Campbell-Towle Lumber Company, Big Lakes Lumber Company, and Shaw-Bertram Lumber Company, but that he had not received a similar report from the plaintiff; that the plaintiff had recently advised that its financial statement would not be ready to submit prior to April 1.

On February 14, 1929, the Forest Valuation Engineer of the Indian Service advised the Commissioner, by letter, that the Algoma Lumber Company had not submitted a financial statement, and had advised that such report, by reason of the non-closing of its books until February 28, 1929, would not be available until about April 1; that in these circumstances he would not be able to submit his report until the last of March or early in April.

On May 4, 1929, the Commissioner advised plaintiff, by letter, that the submission of the Forest Valuation Engineer's report had been greatly delayed because of plaintiff's inability to furnish a financial statement with respect to its operations for the year 1928; that in view of the data obtained from the various companies, and from other sources, as to cost and sales prices during the calendar year 1928, he had concluded that the prices for stumpage cut from the Middle Mount Scott Unit during the year beginning April 1, 1929, should remain the same as those paid during the year beginning April 1, 1928.

On May 15, 1929, plaintiff replied to the Commissioner's letter of May 4, and protested against the stumpage price increase effective April 1, 1929. The protest was based on the same facts which it relied upon to support its protest made in 1928, and the further fact that conditions warranted no increase in stumpage price starting in 1929.

On June 19, 1929, plaintiff addressed a letter to the Commissioner, referring to its previous letter of September 29, 1928, wherein it protested against the increase of 40¢ per M feet for pine on the Middle Mount Scott Unit, and also to its letter of May 15, 1929, protesting against the increase in price effective April 1, 1929. Plaintiff protested that no part of the deposits made by it should be applied to the payment for stumpage at a rate greater than $4.90 per thousand feet for yellow and sugar pine, and incense cedar. The Commissioner was advised that if any payments were made in excess of that sum plaintiff would take such action as necessary to recover from the Government the excess amount so paid.

On August 23, 1929, the Commissioner advised the Superintendent of the Klamath Reservation that plaintiff had protested the payment of 40¢ advance in price of yellow pine and sugar pine, effective April 1, 1928, on the Middle Mount Scott Unit, and that pending the final disposition of plaintiff's appeal a sufficient amount should be retained in all individual Indian accounts to cover a refund of 40¢ per M feet on all timber cut from particular allotments and paid for at the advance price, effective April 1, 1928.

Reporter's Statement of the Case

On March 22, 1930, plaintiff requested the Commissioner to consent to the reduction of the minimum quantity of timber required to be cut by plaintiff under its contract. On March 27, 1930, the Commissioner wired plaintiff that the cut made by it on the Middle Mount Scott Unit during the preceding logging season would be accepted as a compliance with the contract cutting requirements on the Middle Mount Scott and Antelope Valley Units.

On December 3, 1930, plaintiff forwarded to the Superintendent of the Klamath Reservation duplicate invoices for $25,094.56, the amount allegedly overcharged on timber cut by plaintiff during 1928, 1929, and 1930, under its Middle Mount Scott Unit contract. The letter contained the following paragraph:

> We have not yet started suit in the Court of Claims for recovery of this amount, as we have it in mind to await the result of the suits now pending by the Lamm Lumber Company and the Forest Lumber Company, whose claims against you are based upon much the same grounds as our own. During a recent trip to Washington I talked with Mr. Kinney about this matter, and he told me that he saw no reason why our claim could not be allowed without a suit providing precedents favorable to us were established by the decisions in these other cases.

On December 28, 1931, the Supervisor of Forests, Klamath Agency, Oregon, certified that the plaintiff had satisfactorily completed operations under its Middle Mount Scott Unit contract.

Scaling began November 5, 1917, and was completed April 30, 1930. The total footage of timber of all species cut by plaintiff under its contract on tribal and allotted lands was 316,879,370 feet, valued at $1,460,950.95. The total quantity of yellow pine cut by plaintiff from tribal land under its contract was 240,781,900 feet board measure, valued at $1,157,040.73. It cut 72,354,080 feet board measure of yellow pine, valued at $300,642.35 from individual Indian allotments; or a combined total quantity of yellow pine cut from tribal and allotted lands of 313,135,980 feet board measure, valued at $1,457,683.08. The value of all species of timber

other than yellow and sugar pine cut from tribal land and also allotments was $3,267.87, or a total value of $1,460,-950.95.

For the first three-year period under the contract ending March 31, 1920, plaintiff paid for yellow and sugar pine a stumpage price of $3.57 per M feet B. M.; for the second three-year period ending March 31, 1923, plaintiff paid $4.24; and for the third three-year period ending March 31, 1926, plaintiff paid $4.90. Beginning April 1, 1928 (the third year of the fourth three-year period, which began April 1, 1926), plaintiff paid $5.30; for the fifth period beginning April 1, 1929, plaintiff paid $5.30 per M feet B. M. The average stumpage price paid by plaintiff for yellow and sugar pine under the contract was 4.5025 per M feet B. M.

15. From April 1, 1928, to March 31, 1929, plaintiff cut 26,019,330 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Indian Reservation. That quantity of timber multiplied by 40¢, the amount of the challenged price increase made effective on April 1, 1928, totals $10,407.73.

16. From April 1, 1929, to March 31, 1930, plaintiff cut a total of 31,633,190 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Indian Reservation. That quantity of timber multiplied by 40¢, the amount of the challenged price increase effective April 1, 1929, totals $12,653.28.

During the contract period beginning April 1, 1930, and ending March 31, 1931, plaintiff cut a total of 5,083,870 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Reservation. That quantity of timber multiplied by 40¢ per M feet board measure, the amount of the challenged price increase paid during the period beginning April 1, 1930, totals $2,033.55.

17. The total quantity of yellow and sugar pine cut by the plaintiff during each of the yearly contract periods beginning with April 1, 1928, and ending with March 31, 1931, totaled 62,736,390 feet board measure. That quantity of timber multiplied by 40¢ per M feet, the amount of the challenged price increase made effective under the contract

April 1, 1928, and which continued in effect during the remainder of the contract period, totaled $25,094.56.

18. During the 14 years prior to 1931, the Indian Service made an investigation and study of the comparative production costs and selling price trends of timber within the Klamath Region for the purpose of establishing a sound basis to guide the Commissioner of Indian Affairs in determining the stumpage rates to be fixed by him during each of the three-year periods specified in the contract.

The area specified in the contract of July 28, 1917, as "the Southern Oregon and Northern California region" had always been understood by lumbermen and engineers familiar with the locality as embracing the Klamath Region. Speaking generally, this region is a definite economic unit in the lumber industry and is composed primarily of Klamath County, Oregon, and also small parts of Lake County, Oregon, and Modoc County, California. Topographically, this economic unit embraces the Klamath Basin which is bounded on the west by the Cascade Mountains; on the north by the divide between the waters of the Williamson and Deschutes Rivers; on the east by the Lake View Basin; and on the south by the Lava Beds of Northern California. The principal producing center of this region is Klamath Falls, Oregon. Lumber manufacturing operations are, comparatively speaking, centralized within the vicinity of that place, and all the larger companies located there operate under similar physical and industrial conditions, and distribute their products through the same markets.

During each year from 1917 to 1931, the Indian Service compiled statistical information covering the market price and production cost trends of lumber in the Klamath Region, which data was abstracted from the certified operating statements of the principal lumber-producing companies operating within the Klamath Region. These certified statements were submitted to the Commissioner of Indian Affairs by the various companies competing for timber within the Klamath Reservation, and form a part of the permanent record of his office.

To assist the Commissioner of Indian Affairs in making the stumpage price adjustments under the contract, he as-

signed an expert timber valuation engineer to make a special study of production costs and sale price trends of lumber at the mills within the Klamath Region, and to submit yearly reports showing the trends of such costs and sales prices within that region. Such reports were made for the years 1920, 1923, 1924, 1926, 1927, 1928, 1929, 1930, and 1931. This valuation engineer was thoroughly familiar with the timber within the area covered by the contract, having been assigned to survey that timber as early as 1913. All the yearly reports touching the price trends within the Klamath Region were made to the Commissioner of Indian Affairs by this engineer. The reports were comprehensive, and considered all factors affecting the trend of production costs and selling prices of timber within the area specified in the contract.

Plaintiff and other timber producing companies operating within the Klamath Region were members of the California White and Sugar Pine Manufacturers Association. It was the practice of the plaintiff and other members to furnish to the association statistics respecting operations, volume production, grades, and prices received for each individual order which was shipped. This association published annually statistical statements containing an analysis of lumber prices of pine and other species of timber grown within the area defined in the contract. These statements showed summaries of inventories, orders, stocks, and comparative data on production at member mills in Oregon and California. A synopsis of the grade prices of California white pine, as shown by these statements, was incorporated in the valuation studies conducted by the Indian Service for the purpose of determining the readjustment of stumpage prices under contracts affecting the Klamath Indian Reservation in Oregon.

These statistical statements were compiled for the purpose of furnishing contributing members with information respecting the prices of upper grades of lumber. Prices which covered the lower grades, namely, box and common, and which constituted more than 65% of the log, were not reported.

19. The record in this case shows that about 60% of the timber cut by plaintiff, under the contract in suit, was made by it into box shook, and that the annual statistical statements published by the California White and Sugar Pine Manufacturers Association did not show the prices received by plaintiff for the box shook manufactured by it. Because of the omission of these data, the average mill run wholesale net value of lumber f. o. b. mills, as defined in the contract, could not be determined from the annual statistical statement published by the California White and Sugar Pine Manufacturers Association. The information contained in these statements was used only for comparative purposes by the Commissioner of Indian Affairs in determining the stumpage price adjustments under the contract, and never formed the basis of determination in connection with stumpage price readjustments, because of the inapplicability of the data contained therein to the procedure specified in the contracts.

In determining the regional average figures covering both production costs and sales prices, the valuation engineer followed a method intended to secure directness and mathematical simplicity. He computed the net return from sales after all adjustments for commissions, freight, etc., had been divided by gross volume sold, to show average price; and the total volume sold, divided by total costs of sales, to show average unit cost. The final yearly audits of the various corporate purchasers of timber operating within the Klamath Region, as certified by their respective accountants, were totaled and direct averages obtained. The Valuation Engineer, representing the Indian Service, was thus enabled to establish for each year the average mill run wholesale net value of lumber at mills in the Klamath Region in Southern Oregon and Northern California, as defined in the contract.

The Klamath Region is noted for its fine quality of pinus ponderosa (a species of Western yellow pine). Because of its fine texture and adaptability for various commercial uses, lumber produced from that species of pine, for many years prior to 1931, entered Eastern markets under the descriptive

classification of California white pine, in competition with the celebrated Northern or true white pine. There was sharp competition between rival lumber companies operating within the Klamath Region for the stumpage on the Klamath Reservation.

The highly competitive stumpage market that developed within the Klamath Region during the period of this contract was unprecedented and not foreseen by persons conversant with the trend of lumber prices. This highly competitive situation was aggravated by the post-War boom, which caused the values of stumpage to advance more rapidly than in any other known comparable area.

In the determination of the production costs of timber the cost of stumpage is one of the most important single factors to be considered.

The statistical studies and reports made by the Valuation Engineer show that during the contract period the average mill run net wholesale value of pine lumber within the Klamath District fluctuated from a low of $17.49 in 1917, to a high of $42.44 in 1920. Sales prices remained at comparatively high levels from that year through to 1925, and thereafter gradually declined to $24.73 in 1927, rising again to $25.50 in 1929.

Production costs within the same area showed a corresponding fluctuation during the period in question, rising from a low of $15.33 per M feet in 1917, to a high of $30.70 per M feet in 1920. Production costs remained at a comparatively high level through 1923, the level for that year being $28.01 per M feet, and gradually declined thereafter to $23.38 in 1928, again rising to $25.07 in 1929.

From 1917 to 1929 the stumpage prices of pine timber in the open competitive market in this area ranged from a low of $3.25, to a high of $8.00 per M feet. The record shows that the prices of stumpage within the pertinent period of the contract fluctuated greatly. The graph, evidencing the trend of stumpage prices within this competitive area, reflects only a comparatively slight increase in prices during and immediately following the years of highest sales prices for lumber, namely, 1919 to 1923, with frequent recessions in the stumpage price trend during that period. In

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1917 the average sale price of stumpage within the competitive area was $3.44; whereas in 1927, the average sale price of stumpage within the Klamath Region was $7.64 per M feet.

The statistical studies and reports made by the valuation engineer show that during the contract period the average millrun net wholesale value of pine lumber within the Klamath District fluctuated as follows:

Year:	*Average Millrun Net Wholesale Value of Pine Lumber Per M.*
1917	$17.49
1918	22.96
1919	27.46
1920	42.44
1921	28.50
1922	31.71
1923	30.37
1924	27.51
1925	27.48
1926	26.36
1927	24.73
1928	24.75
1929	25.50

Production costs for said years within the same area as shown by said statistical studies and reports were as follows:

Year:	*Production Cost Per M.*
1917	$15.33
1918	21.52
1919	25.43
1920	30.70
1921	27.79
1922	27.59
1923	28.01
1924	25.59
1925	24.62
1926	24.37
1927	24.45
1928	23.38
1929	25.07

20. The limitation imposed by the contract on the discretionary authority of the Commissioner, with respect to fixing the stumpage rates to be paid during each of the three-year periods specified therein, was the proviso that

such advance in stumpage rates, as determined at the close of each specified period,

> shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

At the time of imposing the stumpage price increases, effective April 1, 1920, and April 1, 1923, for the first and second price readjustment periods specified in the contract, it was understood by plaintiff and other purchasers that the Commissioner of Indian Affairs would reconsider his action, and reduce such price increases during any year following the year that the price increase was made should market conditions warrant such action. The contract contained no provision for a reconsideration by the Commissioner of the stumpage price within any three-year period.

On April 1, 1926 (the third price adjustment period prescribed in the contract), plaintiff was advised, by telegram from the Commissioner, that the price would not be increased on that date. That year the lumber market was seriously depressed, and the Commissioner, responsive to the urgent appeals made by plaintiff and other timber purchasers, deferred putting into effect a price increase during that year. Officials of the Indian Service had considered putting into effect a price increase on April 1, 1926, but the Commissioner did not believe it would be fair to impose such a price increase, because of the uncertainty of the future market.

The depression that affected the lumber market in 1926 continued into the year 1927, and prior to April 1 of that year the Commissioner notified the plaintiff that no increase in price would be made effective April 1, 1927. This action was taken by the Commissioner because of the general weakness of the then existing lumber market.

The matter of increasing the stumpage price, effective April 1, 1928, was the subject of considerable correspondence between the plaintiff and the Commissioner, subsequent to April 1, 1927, and early in 1928. The plaintiff at that time protested that the contemplated action of the

Commissioner was contrary to the terms of the contract, and that present and prospective market conditions were not favorable.

Plaintiff originally bid a price of $3.57 per M feet board measure for yellow pine. That price continued in effect until March 31, 1920. On April 1, 1920, the stumpage price was increased by 67¢, making the price for the following three years ending March 31, 1923, $4.24. On April 1, 1923, the price was further increased by 66¢, making the new price $4.90, effective for the following three-year period, ending March 31, 1926. That price remained in effect until April 1, 1928, when it was increased by 40¢, making the stumpage price for the last year of the third three-year period $5.30. On January 21, 1929, the plaintiff was advised by the Commissioner that information before his office indicated that the price of yellow and sugar pine, subsequent to March 31, 1929, should be $5.30 per thousand feet, and the same prices for other species then being paid. On May 4, 1929, the Commissioner advised plaintiff that he had concluded that stumpage prices to be paid under the contract for the year beginning April 1, 1929, should be the same as the prices paid during the year beginning April 1, 1928.

In determining the action to be taken in imposing the price increase of 40¢ on April 1, 1928, and again on April 1, 1929, the Commissioner was guided by many factors, and not by any one particular factor. Consideration was given to the fact that there had been a large increase in stumpage values on the Klamath Reservation and adjacent areas. There had been a reduction in manufacturing costs. Price increases in 1920 and 1923 (the first and second price adjustment periods) were only fractional parts of the price increases that might have been imposed in those years. That action was taken because the plaintiff and other purchasers pleaded that they could not afford to pay higher prices, and the Commissioner tried to be fair with the lumber companies, and at the same time protect the interests of the Klamath Indians. Moreover, it was understood by the plaintiff and the Commissioner that in 1921 and 1922 the price increase made effective April 1, 1920, would be re-

duced if market conditions warranted such action. Again in 1923 the plaintiff requested, and the Commissioner agreed, that he would reduce the stumpage price increase in 1924 or in 1925, should market conditions in either of those years warrant such action. There had been a decrease in the average mill run net wholesale prices of lumber within the area defined in the contract, at the pertinent time.

21. The sale of timber upon the allotted and unallotted lands of the Klamath Indian Reservation was authorized by the Act of June 25, 1910, Sections 7 and 8. (36 Stat. 855, 857.) Regulations promulgated by the Secretary of the Interior, as required by that Act, prescribed in detail the procedure to be followed in the sale of timber, and the disposition of the proceeds thereof. The declared purpose of the regulations was "to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." The department of the Government engaged in the administration of Indian Affairs has always treated the Indian Forests as private property, held in sacred trust by the United States, for the Indians. On some reservations the merchantable stand of timber was practically the only source of revenue from which the cost of social and industrial betterments for the Indian Tribe could be met by the Indian Service.

The form of contract of July 28, 1917, except for minor modifications, providing particularly for a fixed increase in the price of stumpage every three years, has been used in every sale of timber on Indian reservations since the passage of the act of June 25, 1910.

In 1923 a form of contract was adopted for the sale of Indian timber, providing for fixed stumpage price increases every three years. Under that form of contract the price to be paid for the first contract period was stipulated. For each of the remaining three-year periods it was stipulated that the purchaser of the timber would pay the prices paid during the preceding three-year period, plus 12% thereof. The modified form of contract also contained a provision authorizing the Commissioner to relieve the purchaser from all or any part of the increase in price under the original contract stumpage price should the Commissioner be satisfied,

after investigation, that notwithstanding efficient operations, the purchaser was unable to make a profit under the then existing market conditions. The contract also contained a proviso that the reduction should never be less than the stumpage price specified during the first period of the contract. The Commissioner also reserved the right to reimpose any part, or all the increases at any time, upon giving notice to the purchaser, subject to review by the Secretary of the Interior. Except as indicated above, the modified form of contract adopted in 1923 was substantially the same in form as the contract approved by the Secretary of the Interior and used in connection with the sale of timber on Indian reservations under the 1910 Act.

Contracts for the sale of timber from unallotted lands of Indian reservations made prior to the act of June 25, 1910, were substantially similar in form to the contract of July 28, 1917, so far as relates to the designation of the parties thereto.

The practice followed by the Bureau of Indian Affairs in the sale of timber on Indian reservations under the act of June 25, 1910, was uniform. Whenever the Commissioner of Indian Affairs determined that timber on Indian reservations should be sold, the practice followed in all cases was for the Superintendent of the Indian Reservation to advertise definite units of timber for sale; accept bids and forward an abstract of such bids to the Commissioner of Indian Affairs in Washington, together with his recommendation respecting the award to be made.

The contract was then prepared on the form prescribed by the regulations, and signed by the Superintendent on behalf of the tribal Indians. When signed by the purchaser, the contract was forwarded by the Superintendent to the Commissioner of Indian Affairs for approval, either by him or by the Secretary of the Interior, depending upon the value of the timber involved in the contract of purchase.

Article 2 of the Tribal Timber Contract of July 28, 1917, authorized the purchaser of tribal timber to make separate contracts with those Indians holding allotments within the sale area covered by the tribal contract who desired to sell the timber thereon. Plaintiff entered into contracts with 21

Indian allottees holding allotments within the sale area designated in the tribal contract, namely, Middle Mount Scott Unit.

These allotment contracts were subject to the same procedure with respect to the making thereof, and prices to be paid for the timber, as was followed in the making of the tribal timber contract; that is, contracts for the sale of timber, either upon unallotted or allotted lands, were made under the supervision of the Secretary of the Interior, but plaintiff made all contracts for the purchase of timber on allotments held by individual Indians with the holders of such allotments.

Collections of the stumpage prices paid under these allotment contracts were made by the Superintendent of the Reservation, under the tribal contract; that is, in the administration of the contracts for the purchase of timber within the Klamath Reservation, growing upon either unallotted or allotted lands, the collections were made as if only one contract was involved.

No contracts for the sale of Indian tribal timber have been made in the form and manner prescribed by R. S. 2103. Contracts for the sale of Indian tribal timber have always been made substantially in accordance with the form of contract involved in this suit.

Contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber, and by the administrative department concerned, to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior, and specifically the Commissioner of Indian Affairs, for the sole benefit of either the tribal or individual Indians concerned.

22. The purchaser, as required by the terms of the tribal timber contract of July 28, 1917, and the several contracts made by it with individual Indians holding allotments within the sale area designated as the Middle Mount Scott Unit, paid to the Superintendent of the Klamath Indian

School the sum of $1,460,950.95. Of this sum, $1,159,494.52 represented payment for various species of timber cut from tribal lands. The remaining $301,456.43 represented payments for various species of timber cut from allotments held by individual Indians.

The act of March 3, 1883 (22 Stat. 582, 590), as amended by the act of May 17, 1926 (44 Stat. 560), provides in substance that the proceeds of sales of timber on any Indian reservation, except those of the Five Civilized Tribes, shall be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of such tribes and under such regulations as the Secretary of the Interior shall prescribe.

The act of March 2, 1887 (24 Stat. 449), vested in the Secretary of the Interior discretionary authority to expend such proceeds for the benefit of the respective tribal Indians concerned.

Section 27 of the act of May 18, 1916 (39 Stat. 123, 158), prescribed the procedure to be followed thereafter with respect to the expenditure of tribal Indian funds covered into the Treasury and deposited to the credit of the tribes, pursuant to the acts of March 3, 1883, and March 2, 1887.

The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which such Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned, upon the books of the Treasury, and subject to the order of such Indian.

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any Indian Agent, Superintendent, etc., to deposit Indian money, individual or tribal, coming into his hands as custodian, in such private banks as he might select, subject to the requirement that such banks

execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds.

The act of May 25, 1918 (40 Stat. 561), authorized the Secretary of the Interior to withdraw from the Treasury tribal funds susceptible of segregation, so as to credit an equal share to each member of the tribe and to deposit the funds in private banks, subject to withdrawal for payment to the individual owners, or expenditure for their benefit.

Prior to the act of February 12, 1929 (45 Stat. 1164), as amended by the act of June 13, 1930 (46 Stat. 584), tribal funds deposited in the Treasury of the United States to the credit of such Indians did not bear interest. Following the passage of that Act, tribal Indian funds on deposit in the Treasury of the United States to the credit of the respective Indian tribes bore simple interest at the rate of 4%.

The act of July 1, 1898 (30 Stat. 595), required United States Indian Agents to account for all funds coming into their hands, as custodians, from any source, and to be responsible therefor under their official bonds.

23. All the proceeds on account of purchase of timber on the Middle Mount Scott Unit, Klamath Indian Reservation, paid by the plaintiff to the Superintendent of the Klamath Indian School for the timber cut by it under the tribal timber contract of July 28, 1917, and the several allotment contracts made with individual Indian owners, as authorized by Article 2 of that contract, less the sum of 8% thereof, were deposited by the Superintendent, either in private state banks or in the Treasury of the United States, to the credit of the tribal, or individual, Indians concerned.

The tribal timber contract of July 28, 1917, and the several contracts made by the plaintiff with the holders of allotments, were administered as one contract, and all the proceeds arising under such contracts were paid to the Superintendent. The proceeds from the tribal contract were deposited in the Treasury under an account designated "Indian Moneys, Proceeds of Labor, Klamath Indians." No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United

States. All the net proceeds of the sale of such timber was deposited by the Superintendent to the credit of the respective tribal, or individual, Indians concerned.

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber, in accordance with Paragraph 21 of the amended Regulations, approved March 17, 1917, and the provisions of Section 1 of the act of February 14, 1920 (41 Stat. 415), which authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for the work incidental to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales of such timber. This 8% was deducted by the Superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses of administering the contracts of sale and the Indian forests. It was deposited in the Treasury to the credit of the United States, under the caption "Miscellaneous Receipts."

With respect to the method of accounting for the proceeds of sales of timber under the contracts, the practice followed by the Office of Indian Affairs was for the purchaser to pay to the Superintendent the advance payments, as stipulated in Article 4 of the contract.

Upon receipt of the proceeds from the purchaser the Superintendent of the Klamath Reservation made a credit upon the books kept in his office at the Klamath Agency in Oregon, showing the amount of money payable to the Klamath Indians and also the respective sums of money payable to the individual Indian allottees concerned. This action was based upon scale reports made by Civil Service employees of the United States attached to the Klamath Indian Agency. The money belonging to individual Indian allottees was deposited in private banks, in a lump sum, to the credit of the Superintendent or Disbursing Officer of the Indian Agency who held such moneys in trust for the respective Indian allottees. The banks selected as depositaries for individual Indian moneys keep no record of the individual Indian accounts; that is, trust funds were subject

to withdrawal by the Superintendent of the reservation and were distributed by him to the individual owners thereof under regulations prescribed by the Commissioner of Indian Affairs, and approved by the Secretary of the Interior. In cases involving large sums of money the matter was submitted to the Commissioner of Indian Affairs for authorization to distribute such moneys.

24. Early legislation vested unlimited discretion in the Secretary of the Interior with respect to the expenditure of moneys credited to the tribal Indians. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), restricted this discretion, subject to the following proviso:

> * * * that hereafter no money shall be expended from Indian Tribal funds without specific appropriation by Congress, except as follows: equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are continued in full force and effect.

During the period from 1922 to 1934, both inclusive, per capita payments in excess of $6,200,000 had been made direct to the Klamath Indians, on account of the proceeds paid under tribal contracts for the sale of timber on that reservation. Competent Indians were paid their shares of the per capita payments directly. The per capita shares of other Indians were deposited in their accounts and expenditure thereof was subject to departmental regulations.

The proceeds of sale from Klamath Indian timber have always been treated by the administrative department concerned as moneys belonging to the Klamath Indians, either tribal or individual, and not as public funds belonging to the United States.

Prior to 1927, it was the practice for the Superintendent of the Klamath Indian Reservation to submit an account of all the Indian moneys in his possession to the office of the Bureau of Indian Affairs, and it was not then the practice of the General Accounting Office to review such reports. However, subsequent to 1927, the General Accounting Office has reviewed the accounts of Superintendents concerning Indian moneys in their possessions.

Syllabus

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff seeks in this suit to recover the sum of $25,094.56, alleged to have been illegally collected from plaintiff as a part of the purchase price of certain Indian timber sold to plaintiff by the defendant. The controversy arises out of an increase in the price of yellow and sugar pine made by the Commissioner of Indian Affairs for the period beginning April 1, 1928, and ending March 31, 1931.

The facts disclosed are in all essential respects similar to the facts in the case of the *Forest Lumber Company*, No. L–391, this day decided (*ante*, p. 188). The questions of law presented are precisely the same. Our decision in the *Forest Lumber Company case* therefore controls the decision in this case and an extended opinion would be but a reiteration of what has already been said in that case, and is not deemed necessary.

Therefore, on the authority of the *Forest Lumber Company case*, the plaintiff is entitled to recover and is hereby awarded judgment in the sum of $25,094.56. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

AMERICAN WOOLEN COMPANY v. THE UNITED STATES

[Nos. 42459 and 42904. Decided on rehearing February 7, 1938, reaffirming the decision of the Court on April 7, 1937 (85 C. Cls. 101), and reaffirming the overruling of motion for a new trial October 4, 1937]

Both the opinion delivered on the rehearing, and the original opinion of the Court, are published in full in 85 C. Cls. 101.

Reporter's Statement of the Case

GEORGE J. MELLINGER, JOHN S. MELLINGER, CARL F. DOEHRING, INDIVIDUALLY AND AS TESTAMENTARY TRUSTEES UNDER THE WILL OF MARY ANN SWEENEY, DECEASED; AND MICHEL J. MELLINGER, AND MRS. ELMA D. GILBERT, JOINED PRO FORMA BY HER HUSBAND, T. BRUCE GILBERT, v. THE UNITED STATES

[No. 42852. Decided February 7, 1938. Judgment entered April 6, 1938 [1]]

On the Proofs

Income tax; note accepted for interest due; effect of taking security.—The rule in most jurisdictions, including the Federal courts, is that, in the absence of an agreement or consent to receive it as such, a promissory note of the debtor, although accepted by the creditor, does not in itself constitute payment or amount to a discharge of the debt.

Same.—The taking from debtors of separate new notes including past due interest, for which new or additional security is taken, does not constitute the receipt of taxable income by a taxpayer keeping her books on a cash basis.

Same.—The taking of security for a preexisting debt does not constitute payment or discharge of the debt, and it follows that the taking of additional security does not constitute payment of the debt.

The Reporter's statement of the case:

Mr. Robert Ash for the plaintiffs.

Mr. J. W. Blalock, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. John J. Sweeney and Mary Ann Sweeney were husband and wife. John J. Sweeney died November 13, 1925, and Mary Ann Sweeney died March 30, 1930.

2. Under the will of John J. Sweeney, Mary Ann Sweeney received a life interest in the community estate of John J. Sweeney and Mary Ann Sweeney. John J. Sweeney did not

[1] Post, p. 778.

have any separate property and acquired no property by gift or descent.

3. For the years 1926 and 1929 Mary Ann Sweeney, hereinafter sometimes referred to as the "taxpayer," duly filed income tax returns. For 1926 an income tax of $23,140.50 was assessed, which was paid as follows:

March 11, 1927	$5,785.13
June 15, 1927	5,785.13
September 16, 1927	5,785.13
December 15, 1927	5,785.11

4. For 1929 an income tax of $28,026.88 was assessed, which was paid as follows:

March 16, 1930	$7,006.72
June 10, 1930	7,006.72
September 11, 1930	7,006.72
December 15, 1930	7,006.72

5. John J. Sweeney's business was that of making loans on real estate and that business was continued by Mary Ann Sweeney. His books and the books of Mary Ann Sweeney were kept on the cash receipts and disbursements basis and the income tax returns were filed on the same basis.

6. In 1926 the taxpayer held three notes of T. F. Loftus as follows:

(a) $60,000.

This note was executed December 1, 1915, and was secured by a deed of trust on certain real estate (lots 1 and 2, block 59) in Houston, Texas.

(b) $75,000.

This note was executed April 20, 1915, and was secured by a deed of trust on certain real estate (parts of lots 11 and 12, block 19) in Houston, Texas, and by a note for $95,000 held by Loftus and assigned as security, such note being that of a negro fraternal lodge (Knights and Daughters of Tabor), which note was in turn secured by a deed of trust on certain real estate and which was payable in ninety-nine years.

(c) $25,000.

This note was originally executed August 18, 1917, and had been extended from time to time and in 1926 its maturity date was shown as August 18, 1927. It was secured

by deed of trust on certain real estate (lots 6, 7, and 8 and a part of lot 12, block 41) in Houston, Texas.

7. Loftus paid interest on the three notes referred to above with reasonable regularity until about 1922 or 1923 when he began to get in arrears on his interest payments and by 1926 interest was past due and unpaid on all of these notes. Formal demands were made for the payment of the interest and letters were written calling attention to the overdue interest and urging payment, but these efforts to collect failed to produce satisfactory results. However, no steps were taken looking to foreclosure on any of the property securing the loans and no efforts were made to collect the principal.

8. In the meantime, during 1926, one of the lots securing the note for $25,000 (lot 8, block 41) was released and thereafter sold by Loftus. After the sale Loftus paid certain amounts on account of interest on two or more of the notes, but even after these and other payments interest was still in arrears on all of the notes at the date of the issuance of a new note as shown in finding 9.

9. December 21, 1926, when efforts to collect the interest had failed, it was arranged that Loftus should give a note to the taxpayer for $56,106.98 in place of the note for $25,000 and for the interest in arrears on the three notes, that is, $31,106.98. Of the latter amount a part represented interest which had accrued on these notes prior to the death of John J. Sweeney on November 13, 1925, and the balance, $15,332.89, represented interest in arrears from November 13, 1925, to January 1, 1927. The note was secured by deed of trust on certain real estate (lots 6 and 7 and a part of lot 12, block 41) in Houston, Texas, which property had theretofore secured the note for $25,000, and the party or parties in whose favor the note was issued considered the security given ample to secure the note. At that time Loftus was without sufficient ready cash with which to meet his obligations. A foreclosure on the real estate securing the three notes involved probably would not have resulted in the realization of cash in the full amount of the principal and interest of the notes, and accordingly the

property probably would have been acquired by the taxpayer, which she did not desire.

In this instance as well as in the instances referred to in findings 11 and 13 the taxpayer did not elect to take notes rather than cash, but pursued the course followed as the best means, in her judgment, of protecting the loans without resort to foreclosure and enabling the borrowers to work out the situation to the best interest of all concerned. By taking Loftus' note for $56,106.98 on December 21, 1926, and including in it the interest items involved in this suit, the taxpayer obtained additional security for this indebtedness.

10. On the taxpayer's books the interest, $31,106.98, included in the note of $56,106.98 referred to in finding 9, was divided into two parts, the amount accrued to November 13, 1925, being treated as corpus of the estate of John J. Sweeney, and the balance accrued from November 13, 1925, to January 1, 1927, $15,332.89, as interest belonging to the taxpayer. The latter amount was included as income by the taxpayer in her return for 1926 and a tax paid thereon.

11. In 1926 the taxpayer held two notes of Bassett Blakely, one for $50,000 and the other for $75,000, which had been executed May 1, 1917, and August 7, 1922, respectively. The notes were secured by deeds of trust on various tracts of land in Texas and subsequent to their execution deeds of trust on other real estate were given to secure these loans. In 1926 interest was in arrears on these notes and Blakely gave to the taxpayer a note dated December 27, 1926, in the amount of $27,398.89 to cover the interest in arrears to certain dates in 1926. The note was secured by deed of trust on Texas real estate in addition to that securing the two loans.

Prior to the time the note of December 27, 1926, was taken the taxpayer had made numerous unsuccessful efforts to collect the interest and had threatened to bring suit, but had started no legal action looking to such collection. At the time of the execution of the note Blakely was without sufficient ready cash to meet these obligations.

12. A part of the amount included in the note for $27,398.89 (referred to in finding 11) represented interest accrued prior to John J. Sweeney's death, and the balance, $10,669.02, interest accrued from the date of John J. Sweeney's death to certain dates in 1926. The taxpayer included the latter amount, $10,669.02, as income in her return for 1926, and paid a tax thereon.

13. August 16, 1928, H. D. Bergman and wife executed a note in favor of the taxpayer for $50,000 which was secured by certain real estate in Houston, Texas. The taxpayer also held another note of Bergman for $5,000. May 16, 1929, when interest was in arrears on both notes and the taxpayer had been unable to collect, Bergman executed a new note in favor of the taxpayer for $55,000. This note took the place of the note for $50,000, which was thereupon cancelled, and the new note was secured by the same property as the old note. The additional amount of $5,000 was made up of the following items:

Accrued interest on $50,000	$2,470.00
Accrued interest on $5,000	329.21
Taxes paid on behalf of Bergman	2,070.91
Recording and attorney's fees	48.50
Cash advanced to Bergman	81.38

The cash was advanced to Bergman because he was practically penniless at the time and needed the money for groceries, light, and water bills. Efforts had been made to collect the Bergman interest, but they were unsuccessful, and efforts had been likewise unsuccessful on the part of the owners in selling the real estate which was security for this note.

14. The interest items amounting to $2,799.21 which were included in the note for $55,000, as shown in finding 13, were included by the taxpayer in her income tax return for 1929 and a tax paid thereon.

15. September 11, 1930, claims for refund were filed for 1926 and 1929 in the respective amounts of $6,684.74 and $4,641.25. Two of the items included in the claim for 1926 were items to the effect that the interest items of $15,332.89 and $10,669.02, referred to in findings 10 and 12, were improperly included as income in the taxpayer's return for

that year. Subsequent to the filing of the claim, an overpayment was determined by the Commissioner for 1926 of $92.51 on account of adjustments other than for the two interest items, and that amount was refunded.

16. The claim for refund for 1929 included the items of interest referred to in finding 14 in the amount of $2,799.21, the contention being that that item was improperly included by the taxpayer in her return for that year. In connection with that claim an overassessment of $3,075.67 was determined on account of adjustments other than for the interest item, and appropriate refund was made on account thereof.

17. December 29, 1932, the Commissioner advised the taxpayer's representatives that the claims referred to in finding 15 had been disallowed on a schedule dated November 25, 1932, except as to the allowance referred to in findings 15 and 16.

The court decided that the plaintiffs were entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action to recover alleged overpayments of income tax for the years 1926 and 1929. It appears that Mary Ann Sweeney, now deceased, hereinafter referred to as the taxpayer, whose testamentary trustees are among the plaintiffs in this action, in 1926 held notes of two parties named Loftus and Blakely upon which the interest was past due. Repeated demands on the respective parties having been made for the payment of the interest without any results being obtained, the taxpayer accepted from each of them separate new notes which included the interest which was past due on his respective obligations. The taxpayer having acquired sole title to these notes on the death of her husband reported the interest thereon which had accrued since his death in 1925 as part of her income for the year 1926, although no cash payment was received, and paid the tax thereon accordingly.

In 1928 the taxpayer held certain notes executed by one Bergman and his wife, and in 1929, having been unable to collect the interest which was due, Bergman executed a new

note which included the amount due on the two notes formerly executed with interest and the old notes were canceled. The interest that was included in the new note was also included by the taxpayer in her return for 1929 and the tax paid thereon accordingly.

Later refund claims were duly filed claiming that the interest items above referred to were improperly included as income in the taxpayer's returns for the respective years. There is no dispute as to the amount of interest so included and the sole issue in the case is whether it was properly taxable as income.

The taxpayer's books were kept on a cash receipts and disbursements basis and her income tax returns, if properly prepared, would be made upon the same basis. No cash was received at the time any of the new notes were taken, nor was anything received or obtained which would take the place of cash. The question therefore is whether anything was received which amounted to income; in other words, whether there was in fact any payment made when the new notes were taken.

If nothing had been done except to take new notes it would hardly be contended that there was a payment and that the new notes were evidence of income received. The rule in most jurisdictions, including the Federal Courts, is that in the absence of agreement or consent to receive it as such, a promissory note of the debtor, although accepted by the creditor, does not in itself constitute payment or amount to a discharge of the debt. 48 C. J., p. 610, § 40. And the Board of Tax Appeals in *San Jacinto Life Ins. Co.*, 34 B. T. A. 186, held that a promissory note given in evidence of the liability of the maker for overdue interest upon which nothing was paid did not show that the taxpayer received any interest income. The evidence fails to show that there was any agreement or understanding between the debtor and creditor that the new notes should operate as a payment and extinguish the original indebtedness. It is true that the new note executed by Loftus was given in place of one of three notes held by the taxpayer together with interest in arrears on all three notes, but apparently

this was done as a matter of convenience in fixing the amount of the lien upon the new security.

The case of *Great Southern Life Ins. Co.*, 36 B. T. A. 828, is cited by plaintiffs but it is not directly in point. The Board gave as part of its reasons for the decision that the renewal notes were secured by the identical property which secured the old notes and the security was of a value less than the amount of the old notes, also that there was no market for the renewal notes.

The recent case of *Claire D. Schlemmer* v. *United States*, decided January 10, 1938, by the U. S. Circuit Court of Appeals for the Second Circuit, 384 C. C. H., par. 9041, tends to support the contention of plaintiffs although the facts are not exactly parallel. In that case, it appeared that the plaintiff had received a note for the amount of a debt which was owing to him and that in making up his income tax he returned the amount of the note as income and paid the tax computed thereon. Later he filed a claim for refund alleging in substance that the receipt of the note did not constitute income for that year. The Circuit Court of Appeals held that the note given plaintiff did not pay the debt in the absence of an agreement to that effect, citing among other cases *Segrist* v. *Crabtree*, 131 U. S. 287, which approved the doctrine that the note only operated as an extension of the payment of the debt unless it was otherwise expressly agreed by the parties. The *Schlemmer case* also holds that the tax return is no evidence of an agreement that the note should be payment. We think the principles laid down in this case apply although it does not appear that any security was taken at the time when the note was given. In the case at bar, the taxpayer actually received nothing in the way of money or property. All that she got was the right, contingent upon payment not being made within the time specified by the note, to foreclose the lien upon certain property and apply the proceeds to the payment of the debt.

The argument made on behalf of the defendant is that for the interest due on the Loftus and Blakely notes additional security was given and thereby the taxpayer acquired new

and additional rights which were of value to her. It may be conceded that this additional security was of some advantage to the taxpayer but there is nothing in the evidence from which we can determine of how much value this advantage was. It is uniformly held that the taking of security for a preexisting debt does not constitute payment or discharge of the debt. 48 C. J., p. 625, §60. And if this be true, it follows that the taking of additional security would not constitute a payment on the debt. In decisions as to whether the receipt of a note will constitute payment, the courts have sometimes referred to the note itself as additional security for the reason, as we understand, that the obligation is made more definite although the time of payment is extended. The situation is not materially different than it would have been if the taxpayer without receiving any new note had agreed to extend the time for the payment of interest and taken additional security, in which event we think the authorities cited above show there would have been no payment.

Helvering v. *Midland Ins. Co.*, 300 U. S. 216, does not, as we think, support the contentions of defendant. In that case it appeared that a life insurance company at a foreclosure sale bid the principal of its mortgage loan plus accrued interest and took over the property in satisfaction of the whole debt without any cash being disbursed in the transaction and it was held that the amount of the interest was taxable as income. Obviously, as stated in the opinion, the bid was made for the purpose of avoiding loss of investment in case of redemption by the mortgagor. It is perfectly clear that in this case the original debt was extinguished and this could only be done by a payment in some form. The fact that cash was not used in the transaction did not alter the situation. The case has no similarity to the one now before us. We think it merely shows that the payment need not be in cash where there is an equivalent.

It was also said in the opinion in the *Helvering case* that—

> Income may be realized upon a change in the nature of legal rights held, though the particular taxpayer has enjoyed no addition to his economic worth.

But this is far from laying down a general rule that when there is a change in the legal rights of a taxpayer by which he receives some benefit, income has been received. If this were the rule the taking of additional security would constitute payment. The application of the language quoted above will be made plain by an examination of the cases cited in the opinion. All of these cases are very different from the one now at bar.

In determining the rule which should be applied to the case now before us, we find the authorities hold that the giving of a new note for the old indebtedness will not in itself constitute payment, and the giving of additional security will not constitute payment. Neither of these matters has in itself any of the necessary elements of payment, consequently both of them taken together would not constitute payment.

No additional security was taken for the new Bergman note which included the interest which was reported in the taxpayer's return for 1929. There is no contention made that plaintiffs are not entitled to a refund as claimed on the taxes paid for that year, and we think the plaintiffs are also entitled to recover the amount of the overpayment for 1926 which resulted from reporting as income interest which under our view of the case had not been paid.

There has been no argument or discussion with reference to the amount of the refund to which plaintiffs would be entitled in case it should be found that they are entitled to recover on all or any of the several claims made in the petition, but it would seem that the amount stated in the petition is excessive. If counsel can agree as to the amount which plaintiffs are entitled to recover in accordance with the foregoing opinion, a stipulation may be filed stating it and judgment will be entered accordingly. If not, counsel may submit their respective calculations of the proper sum and the court will determine the amount of judgment to be rendered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

MEMORANDUM

Upon a stipulation by the parties showing the exact amount due plaintiffs under the court's holding, on April 6, 1938, judgment was entered in favor of the plaintiffs in the sum of $7,165.80, with interest on $5,692.60 from December 15, 1927; on $801.38 from September 16, 1927; and on $671.82 from December 15, 1930, according to law.

P. L. ANDREWS CORPORATION v. THE UNITED STATES

[No. 43371. Decided February 7, 1938]

On the Proofs

Eminent domain; requisition of lease during the World War.—During the World War the Navy Department requisitioned a part of the Bush Terminal properties, requiring the tenants, of whom the plaintiff was one, to remove by a specified date. *Held*, that plaintiff was entitled to recover. *See Howard Co.* v. *U. S.*, 81 C. Cls. 646, and similar cases.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Mr. George A. King; King & King*, and *Tipple & Plitt* were on the briefs.

Mr. Henry Fischer, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Percy M. Cox* was on the brief.

The court made special findings of fact as follows:

1. P. L. Andrews Corporation, plaintiff, during the period of time hereinafter considered, was, and still is, a corporation organized under the laws of the State of New York, engaged in the manufacture of paper goods.

The President of the United States, on June 20, 1936, approved the following act:

AN ACT For the relief of the P. L. Andrews Corporation

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon

> the Court of Claims to hear and adjudicate, without regard to existing statutes of limitations, the claim of the P. L. Andrews Corporation for just compensation, arising out of the service upon said company of United States Navy Commandeer Order Numbered N-3255, dated June 18, 1918, with the same right as in other cases to either party to apply to the Supreme Court of the United States for writ of certiorari to review any judgment that may be rendered.

On July 18, 1936, plaintiff filed its petition herein, pursuant to the provisions of this act.

2. On June 17, 1922, plaintiff filed its petition in this Court, under Senate Resolution No. 170, which had been adopted on December 21, 1921. The resolution referred Senate Bill No. 1521, 67th Congress, 1st session, to this Court. Plaintiff, in its petition, prayed for a report to Congress that plaintiff was legally entitled to relief on the same claim which is here again the subject of the instant suit. That case was docketed as Congressional No. 17337; and upon the evidence adduced, the Court concluded its findings of fact with the following paragraph:

CONCLUSION

> Upon the facts found the court concludes and reports that the plaintiff has no claim, either legal or equitable, in a juridical sense, against the United States, and that any compensation to it because of the facts recited rests in the discretion of Congress.

The findings of facts so found by the Court, in Congressional No. 17337, as amended April 4, 1927, are of record in this case, in plaintiff's exhibit no. 1, on pages 221 to 226, both inclusive, and are by reference hereby made a part of this finding.

These findings disclosed that plaintiff was subjected to (1) expenses in the sum of $6,724.44, incurred by reason of dismantling its plant in the Bush Terminal Buildings, and reassembling it in its new location; (2) rent claimed by the Bush Terminal Company for the months of October and November 1918 in the sum of $1,121.26; and (3) overhead expenses during the removal when, by reason of such re-

moval, plaintiff was prevented from carrying on its regular business, in the sum of $1,826.67; the total actual expenses amounting to $9,672.37.

Thereafter Congress by an act entitled "An Act to carry out the findings of the Court of Claims in the case of P. L. Andrews Corporation," authorized and directed the payment of $9,672.39 to this plaintiff, "being the damage and loss incurred and suffered by said corporation in compliance with United States Navy commandeer order, numbered N-3255, dated June 18, 1918." This act was approved May 29, 1928. This amount, which included nothing for the unexpired leasehold term, was paid to and received by the plaintiff.

3. On April 6, 1917, the Congress of the United States, by resolution, declared that a state of war existed between the Government of the United States and the Imperial German Government.

On June 19, 1918, the Navy Department served on the Bush Terminal Buildings Company, Commandeer Order No. N-3255, and within a day or two thereafter it served a copy upon plaintiff, which stated that, pursuant to the Acts of March 4, 1917, and June 15, 1917, under direction of the President, the premises, hereinafter more fully described, known as the "Bush Terminal Buildings," were commandeered, and the tenants were required to vacate on or before December 1, 1918. The material parts of the order so served upon plaintiff and the Bush Terminal Buildings Company, are as follows:

N. S. A. 550 Navy Order Number N-3255

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C., June 18, 1918.

BUSH TERMINAL BUILDINGS CO.,
100 Broad Street, New York, N. Y.

SIR: 1. Pursuant to the provisions of the acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the

conditions stated in subparagraph B (subparagraph A is eliminated), to furnish service needed by the Navy as listed below. Compliance with this order is obligatory and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

* * * * *

1. The following-described premises situated on the blocks (*a*) bounded by the northerly building line of 36th Street; easterly building line of 2d Avenue, southerly building line of 35th Street and westerly building line of 3d Avenue, (b) the northerly building line of 35th Street; easterly building line of 2d Avenue; southerly building line of 35th Street and westerly building of 3d Avenue, all in the Borough of Brooklyn, city of New York, State of New York, known as Bush Terminal Model Loft Buildings, numbers 3, 4, 5, and 6, being 6-story concrete, fireproof buildings, 200 feet by 700 feet, constructed in a U-shape with a court 500 feet by 50 feet; the said several dimensions more or less, all owned and controlled by the Bush Terminal Buildings Company.

* * * * *

3. It is further understood and agreed that the Navy Department will accept occupancy of all or any part of this space on or before December 1, 1918, it being the intention of the Navy Department to permit the tenants now occupying the space above mentioned to vacate same before December 1, 1918, or at such earlier date as they may secure other suitable quarters and that the obligation of the Navy Department for rental of said space, as it may be from time to time vacated, will begin on the date that the space is actually vacated, all spaces to be vacated before December 1, 1918.

4. At the time of the service of said commandeer order, plaintiff was a tenant of the Bush Terminal Buildings Company, with manufacturing and warehouse facilities, and occupied, under a lease extending from June 1, 1918 to February 1, 1919, 14,487 square feet, in building no. 4, at a yearly rental of $5,070.45, the same being at the rate of 35 cents per square foot. This lease appears as exhibit B, annexed to the printed petition herein, and is by reference hereby made a part of this finding.

Plaintiff also occupied, under lease, extending from June 1, 1918, to February 1, 1919, 11,978 square feet in building no. 4, at a yearly rental of $4,192.30, the same being at the rate of 35 cents per square foot. This lease appears as exhibit C, annexed to the printed petition herein, and is by reference hereby made a part of this finding.

5. Coincident with the service upon plaintiff of the commandeer order, a board, known as the "Board of Appraisals" was, by order of the Navy Department, convened to (a) appraise and determine the fair and equitable rental which the Navy Department should pay to the Bush Terminal Buildings Company for the space covered by said commandeer order; (b) to determine what additional amount would fairly recompense the various tenants for their claims of loss or damage resulting from enforced vacation of said premises; and (c) as soon as said Board could make preliminary adjustments with as many of the various tenants as possible, to recommend the total amount of the damages or claims, which the board thought should be allowed to the various tenants, as an additional payment on the first year's rent.

On June 21, 1918, the board served a questionnaire on plaintiff. It bore date of June 20, 1918, and required plaintiff, among other things, to furnish the board the approximate cost of dismantling its plant or business and setting it up in working order in a new location. On July 1, 1918, plaintiff replied to the questionnaire, estimating the cost of removal at $9,130.

With a view to checking the information so furnished by plaintiff, Lieutenant John L. Murrie, a member of the board, visited plaintiff's plant in order to ascertain the probable cost to plaintiff of moving its plant to a new location. He made a rigid inspection, but never completed the compiling of his data, and never furnished the result of his work to the board, of which he was a member, because on September 9, 1918, he was ordered to other duty, and had then been notified of the cancellation of the commandeer order.

6. On receipt of the commandeer order of June 18, 1918, plaintiff promptly proceeded with arrangements to vacate

the premises. It made a careful and extended search in the city of New York, and outlying districts, for a new location wherein to carry on its business. There then existed in and about the city of New York a shortage of buildings for commercial use, aggravated, in great part, by the needs of the Government of the United States.

On August 29, 1918, plaintiff finally entered into a lease with Victor E. Dessart, for a one-story brick building, then in the course of construction in the Borough of Brooklyn. The lease was for a term of ten years, at an annual rental of $8,000. Construction of the building was altered to suit the purposes of plaintiff, and plaintiff began the work of dismantling its plant, and made arrangements for its removal, which was accomplished on September 30, 1918. On October 1, 1918, it vacated the premises it theretofore occupied in the Bush Terminal Buildings, and gave notice of such vacation to the defendant. Plaintiff's plant consisted largely of heavy machinery and fixtures, which, in their installation, were bolted or otherwise fastened to the building. The dismantling and removal of same entailed a considerable expense upon the plaintiff. The dismantling and reassembling also affected detrimentally, for a time, the efficiency of the machinery.

On October 1, 1918, plaintiff both vacated and tendered to the defendant 26,465 square feet of space in the Bush Terminal Buildings.

7. On September 13, 1918, plaintiff received notice of the cancellation of the commandeer order, as of September 9, 1918.

On October 30, 1918, the Bush Terminal Company executed the following release:

Release

From the Bush Terminal Company to the United States of America (Navy Department) from all claims or damages on the part of said company, due to the commandeering of said company's buildings 3, 4, 5, and 6, Brooklyn, N. Y.

Whereas an order dated June 18, 1918, was served upon the president of the Bush Terminal Company taking over for use by the Navy Department of the property belonging to said company, known as "Bush Terminal Model Loft Buildings Nos. 3, 4, 5, and 6", being six-story concrete, fireproof buildings, 200 feet by 700 feet, constructed in a U-shape with a court 500 feet by 50 feet; the said several dimensions more or less; and

Whereas at a conference on or about September 6, 1918, between Colonel Wells, assistant to General Goethals, U. S. Army; Rear Admiral C. J. Peoples, Pay Corps, U. S. Navy; and Mr. Irving T. Bush, president, Bush Terminal Company, it was understood and agreed that the Navy Department would immediately withdraw its order of commandeer, dated June 18th, 1918; and

Whereas it was understood and agreed at the conference aforesaid that, if the Navy acted promptly in this matter and but few firms, tenants of the Bush Terminal Company, had moved out, the said company would not bring any claim against the Government by reason of the Navy commandeer order; and

Whereas the Navy representatives did act promptly in the cancellation and abandonment of the commandeer order aforesaid; and but few firms, tenants as aforesaid, moved out;

Now, therefore, in consideration of the premises, the Bush Terminal Company does hereby, for itself, and its assigns, remise, release, and forever discharge the United States of and from all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever in law and in equity, for or by reason of or on account of any damage whatsoever, sustained by the aforesaid Bush Terminal Company, by reason of or on account of any loss or damage to it, caused by the aforesaid action of the Navy Department or its representatives.

In witness whereof, the aforesaid Bush Terminal Company has executed this release as evidenced by the signature of its president, attested by its secretary, and its corporate seal hereto affixed this 30th day of October 1918.

BUSH TERMINAL COMPANY,
By IRVING T. BUSH, *President.*

Attest:
[CORPORATE SEAL] H. F. H. REID, *Secretary.*

8. The United States never occupied the premises so leased by the plaintiff from the Bush Terminal Buildings Company.

Defendant has never paid plaintiff anything for the value of its leasehold so commandeered by the Government.

The rental value of plaintiff's leasehold on said 26,465 square feet so vacated on October 1, 1918, for the period from October 1, 1918 to February 1, 1919, at the rate set forth in the lease, is $3,087.58. The fair market value of the leasehold as of October 1, 1918, was $5,293, a difference of $2,205.42.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This case comes to this court under a special jurisdictional act dated June 20, 1936, 49 Stat. 2341. The act waives the statute of limitations and requires the court to ascertain the amount of just compensation to which the plaintiff is entitled to recover by reason of the taking by the Government of a leasehold occupied by the plaintiff in the Bush Terminal Buildings, New York, under United States Navy Commandeer Order Number N-3255, dated June 18, 1918.

This case is similar to the cases of *William Wrigley, Jr., Company* v. *The United States*, 75 C. Cls. 569; *Thermal Syndicate, Ltd.* v. *United States*, 81 C. Cls. 446; *Charles B. Chrystal* v. *United States*, 81 C. Cls. 461; and *R. S. Howard Company* v. *United States*, 81 C. Cls. 646.

The plaintiff is entitled to recover the difference between the market value of its lease and the stipulated rental paid from October 1, 1918, to February 1, 1919, or the sum of $2,205.42, with interest from October 1, 1918, until paid. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIE CROCKETT WRIGHT, ADMINISTRATRIX OF THE ESTATE OF ROBERT LEE WRIGHT, DECEASED, v. THE UNITED STATES

[No. 248-A. Decided March 7, 1938]

On the Proofs

Contract for use of inventions; authority of Army officers.—Where officers of the Army informed plaintiff by customary form of letter that plaintiff would be fully and fairly compensated if use were made of any of plaintiff's inventions, offered to the Government, there was no express contract between plaintiff and the United States; said officers having authority to negotiate but not to contract. *Beach* v. *U. S.*, 226 U. S. 243, 260. *The Curved Electrotype Plate Co.* v. *U. S.*, 50 C. Cls. 258, 273.

The Reporter's statement of the case:

Mr. Wm. S. Hodges for the plaintiff. *Mr. Martin J. McNamara* was on the brief.

Mr. Carl P. Goepel, Special Assistant to the Attorney General, with whom was *Mr. Assistant Attorney General Sam E. Whitaker* for the defendant. *Mr. J. F. Mothershead* and *Mr. E. R. Weisbender* were on the brief.

In the original and amended petitions Robert Lee Wright declared upon several causes of action, among which was one based upon infringement involving five letters patent. Thereafter, during the taking of testimony, three of the letters patent concerned were withdrawn and the remaining two, 1374703 and 1374707, remained in the case. After the proofs were submitted and shortly before the case was submitted to the commissioner of the court for report of the facts, the plaintiff, as administratrix of the estate of her husband, waived all patent infringement and all other alleged causes of action, with the exception of a cause of action declared on an alleged contract with the defendant for the alleged use of the patents.

Plaintiff claims that the letters which passed between her husband and the officials of the United States constituted a contract for the use of the two patents mentioned which had been granted to her husband under which con-

tract she claims to be entitled to compensation. Defendant denies that a contract was made with decedent and contends that inasmuch as the question of any unauthorized use or infringement of any patents belonging to the decedent or to the plaintiff is not in the case the plaintiff is not entitled to recover.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Robert Lee Wright instituted this suit and alleged, among other things, infringement of five letters patent granted to him, but during the taking of testimony three of the letters patent concerned were withdrawn leaving only two, number 1374703 and 1374707, remaining in the case. During pendency of the suit Robert Lee Wright died intestate, and, on or about February 27, 1935, his widow, Willie Crockett Wright, qualified and was duly appointed administratrix by the Supreme Court of the District of Columbia, and revived and continued to prosecute the suit.

Both the original and amended petitions allege two distinct causes of action, i. e., (1) non-performance of contract for compensation for use of inventions, and (2) patent infringement by the same use.

In plaintiff's brief accompanying her proposed findings of fact before the Commissioner, plaintiff elected to drop the infringement action and rely on the contract action solely. The case was then reopened by the Commissioner to permit plaintiff to make this election a matter of record.

Thereupon plaintiff, Willie Crockett Wright, as administratrix of the estate of her husband, filed with this court a waiver under oath as follows:

> Comes now the undersigned claimant in the above identified case, Willie Crockett Wright, Administratrix of the Estate of Robert Lee Wright, deceased, and sole party in interest, in said case, and respectfully affirms her election to have based her claims therein now under advisement by this Honorable Court upon the single issue of her contract rights established by the amended petition, the evidence in support of said reserved rights and all statutes and valid regulations of the defendant applicable thereto; hereby waiving all other claims recited in said amended petition.

2. The issue of patent infringement, as stated in the petition, having been waived, no findings of fact relative either to the validity of the patents in suit, or to infringement thereof, are made.

The pertinent paragraph of the petition relating to the alleged cause of action on contract is paragraph three of the amended petition and is as follows:

> 3. That your Petitioner avers, that in compliance with a letter dated July 7, 1917, from the Honorable Woodrow Wilson, then President of the United States, and signed by J. P. Tumulty, then Secretary to the President, and through letters and telegrams prior to July 12, 1917, he, on the 12th day of July 1917, entered into a contract with George L. Anderson, Colonel, United States Army, Rtd., acting for and on behalf of the United States, defendant, to furnish the War Department and the Navy Department of the United States certain Ordnance Inventions belonging to the Petitioner and invented by the Petitioner and that said contract was ratified on the 7th day of May 1918, by A. M. Holcombe, Major, Ordnance Department, N. A., acting for and on behalf of the Contract Section, Patents Branch, War Department, and for and on behalf of the United States, Defendant, attached hereto and made a part hereof marked Exhibits A, B, C, D, E, F, G, H, and that in accordance with said contract the Petitioner on the aforesaid 12th day of July 1917, and the 21st day of July 1917, and on divers dates thereafter in the years 1917 and 1918, delivered to the War Department and the Navy Department of the United States, Defendant, certain drawings, specifications and written descriptions of the Petitioner's inventions, some of said inventions being Ordnance Projectiles and Shells having a shell-pointer or projection extending out from the forward end of said Shells and Projectiles carrying explosive in said shell-pointer or projection together with a tube for separate explosive extending from the forward end of the Shell into the cavity for explosive within the Shell, fuzes and other inventions pertaining to said Ordnance Projectiles and Shells, now shown, described and explained in the specifications, drawings and the One Hundred and One Claims in five Letters Patents issued by the United States Patent Office and signed by the Commissioner of Patents, attached hereto and made a part hereof, marked Exhibits 1, 2, 3, 4, and 5, as follows:

Reporter's Statement of the Case

Projectile, Patented April 12, 1921, Patent No. 1374703.

Shell and Projectile, Patented April 12, 1921, Patent No. 1374704.

Projectiles, Patented April 12, 1921, Patent No. 1374705.

Projectile and Bomb Combined, Patented April 12, 1921, Patent No. 1374706.

Shell and Projectile, Patented April 12, 1921, Patent No. 1374707.

3. All the patents recited in the original and amended bill of complaint relate to "projectiles," or shells.

In the period from June 1, 1917, to July 6, 1917, Robert Lee Wright sent to the President of the United States communications by letter and telegram with reference to certain claimed inventions relating to ordnance material. Such communications are not in evidence.

June 27, 1917, Colonel Anderson wrote to Robert Lee Wright, in reply to Wright's letter of June 1, 1917, to the President, enclosing copy of War Department "Memorandum for Inventors," the latter being instructions to be followed by inventors desiring to submit inventions to the War Department for the purpose of interesting the War Department therein. Colonel Anderson's letter and the enclosed memorandum are as follows:

WAR DEPARTMENT,
BOARD OF ORDNANCE & FORTIFICATION,
Washington, D. C., June 27, 1917.

MR. ROBERT LEE WRIGHT,
118 West 42nd St., Los Angeles, Cal.

SIR: Your letter of the 1st instant, addressed to the President, has been referred to the Board of Ordnance and Fortification.

In reply I beg to inform you that if you will comply with the provisions of the inclosed memorandum, your invention will be carefully examined and appropriate action taken.

Very respectfully,

GEO. L. ANDERSON,
Colonel, U. S. Army, Rtd.

The enclosed memorandum is as follows:

WAR DEPARTMENT, BOARD OF ORDNANCE & FORTIFICATION

MEMORANDUM FOR INVENTORS

1. Persons who desire to submit any military invention for consideration should do so by letter addressed to the Board of Ordnance and Fortification, War Department, Washington, D. C.

2. The letter should state the nature of the invention and whether patented or not. It should also state whether or not the person who offers the invention for consideration desires to make any claim for remuneration in connection with it. In the absence of such a claim it will be assumed that no remuneration is expected.

3. Drawings and descriptions should be submitted, to enable the invention to be fully considered, and also any evidence of the usefulness of the device obtained by actual previous experiment. In the case of explosives, etc., the nature and ingredients of the composition should be stated.

4. Original drawings and descriptions should not be submitted, for the reason that all papers considered by the Board of Ordnance and Fortification become part of the archives of the War Department and can not be returned.

5. All matters submitted to the Board will be treated as confidential.

6. The Board can not undertake to bear the expense of the preparation of drawings and descriptions, nor will it advance funds for personal or traveling expenses prior to an examination of such drawings, descriptions, etc., as may be submitted.

7. The Board of Ordnance and Fortification makes its recommendations to the Secretary of War in regard to inventions, and all its proceedings are subject to his approval.

8. Parties will be duly notified of whatever action may be taken relative to their invention.

W. D., B'd Ord. & Fort.
Form No. 8.

4. July 7, 1917, J. P. Tumulty, then Secretary to the President, wrote Robert Lee Wright as follows:

THE WHITE HOUSE,
Washington, July 7, 1917.

Personal.

MY DEAR SIR: The President asks me to acknowledge the receipt of your telegram of July 6th, and to express his regrets that he is unable to arrange to see you. He directs me to suggest that you take up the matter with the Secretaries of War and the Navy.

Sincerely yours,

J. P. TUMULTY,
Secretary to the President.

Mr. ROBERT LEE WRIGHT,
Arlington Hotel Apartments,
Washington, D. C.

5. On August 8, 1917, Colonel Anderson wrote Robert Lee Wright as follows:

WAR DEPARTMENT,
BOARD OF ORDNANCE AND FORTIFICATIONS,
Washington, August 8, 1917.

Mr. ROBERT LEE WRIGHT,
816 Eleventh Street NW.,
Washington, D. C.

SIR: I beg to inform you that at the time of the receipt of your letter of August 6th, the first exhibits presented by you early in July were being examined. All of the eight exhibits have now been considered and I am directed to inform you that each one of the inventions described appears to have such doubtful military value as not to warrant expenditure by the Government in its test or development.

While some of the devices show ingenuity, you should be informed that no one of the inventions submitted by you appears to be as efficient as the best device now used for the same purpose in the various military services. All communications are held as confidential and in the thirty years existence of the board, I have not heard of a single complaint from an inventor that any information was given out by an employee.

Very respectfully,

G. L. ANDERSON,
Colonel, U. S. Army, Rtd.

6. On May 7, 1918, Major A. M. Holcombe wrote Robert Lee Wright as follows:

MAY 7, 1918.

MR. ROBERT LEE WRIGHT,
National Hotel, 6th and Penna. Ave. NW.,
Washington, D. C.

DEAR SIR: 1. I am directed by the Acting Chief of Ordnance to advise you that your communication of May 3, 1918, concerning the use of your inventions by the United States, has been referred to this office for attention.

2. An examination of the inventions shown and described in the applications for United States Letters Patent mentioned in your letter is now being made for the purpose of determining whether or not any of said inventions are being used by the United States, and this office will be pleased to have you call at your convenience and present any further information concerning the use of other inventions not included in the applications mentioned.

3. You may be assured that the Ordnance Department has no intention of using any of your inventions, upon which you have filed applications for patents, without fully and fairly compensating you for such use thereof as has been or may be made during the war.

4. Your interest in submitting your inventions to the United States is appreciated, and prompt action will be taken to ascertain whether or not just compensation has been withheld from you.

Respectfully,

CONTRACT SECTION, PATENTS BRANCH,
A. M. HOLCOMBE,
Major, Ordnance Department, N. A.

7. The communication which Colonel Anderson sent to Robert Lee Wright was merely the usual form of instruction sheet sent to inventors as a matter of routine to assist in submitting inventions to the War Department for consideration.

8. The letter written by Major Holcombe to Robert Lee Wright was the sort of letter that it was customary to write to inventors who submitted devices for consideration by the Ordnance Department.

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9. There is no evidence that Major Holcombe, at the time of writing this letter, had any authority to enter into a contract for and on behalf of defendant to use privately owned inventions and to pay compensation therefor. While he had authority to conduct negotiations leading up and looking to possible contracts, he had no authority to close the same.

10. There is no evidence that there was ever any meeting of the minds between Robert Lee Wright and any officer or agent of the defendant authorized to enter into a contract on behalf of the defendant for use of Wright's inventions by the defendant and for compensation for such use.

The court decided that the plaintiff was not entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

Plaintiff takes numerous and lengthy exceptions to the facts as found by the commissioner. We have carefully considered these exceptions in the light of the record and in connection with the alleged contract forming the basis of this action, and we find the exceptions to the facts found by the commissioner not to be well founded. The additional findings requested relate in the main to certain requested findings with reference to the description, features, structure, and functions of the patents in question and to their infringement by the United States. Obviously such findings are unnecessary and immaterial to consideration of the question whether the decedent had a contract with the United States for compensation for the use of the patents granted to him. *Harvey Steel Co.* v. *United States*, 38 C. Cls. 662, 196 U. S. 310; *The Curved Electrotype Plate Co. of New York* v. *United States*, 50 C. Cls. 258. If it should be held that the decedent had a valid contract with the United States for the use of his patents under which the Government was obligated to pay him compensation, the facts as to the extent of the use and the value thereof in fixing the compensation might become material; in that event, plaintiff would be given an opportunity to prove the amount of such compensation. Otherwise the other requested addi-

tional findings have either not been proved or have been adequately found by the commissioner.

The only question presented by the case as it now stands is whether there was an express contract between Robert Lee Wright and the United States for the use of certain ordnance inventions. We think it is clear from the correspondence of record, upon which plaintiff relies, that no contract existed between the decedent and the United States under which the United States used his inventions and promised to pay compensation therefor. The letters and telegrams which plaintiff alleges were sent to the President of the United States from June 1 to July 6, 1917, are not in evidence and it is clear that the subsequent letters from the Secretary to the President and from Col. Anderson and Maj. Holcombe of the War Department did not result in a contract between Wright and the United States for the use by the latter of any patents belonging to the plaintiff and the payment to plaintiff of compensation for such use. The letter of May 7, 1918, from Maj. Holcombe of the Contract Section, Patents Branch, of the Ordnance Department is the one upon which chief reliance is placed as a ratification of a contract with the decedent growing out of other correspondence. The facts show, however, and Maj. Holcombe testified that he only had authority to conduct negotiations but did not have authority to sign contracts for use of patented inventions by the War Department; that the letter of May 7, 1918, was the kind of letter which it was customary for the War Department to write inventors who submitted devices to the Ordnance Department for consideration; that at the time this letter was written the negotiations with the decedent had not reached the stage of making a contract and that the letter was merely advice to Wright that his inventions would receive consideration and that a proper form of contract would be entered into later if it was found desirable to do so from the standpoint of the Ordnance Department. It will therefore be seen that at most the correspondence between Wright and the United States did not reach a stage beyond the point of mere negotiation. Since Maj. Holcombe did not have authority to bind the United States by

Syllabus

an express contract, it is clear that he could not do so by implication. *Beach* v. *United States*, 226 U. S. 243, 260. *The Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258, 273.

While it is true that Col. Anderson and Maj. Holcombe had authority to write the letters of June 27, 1917, and May 7, 1918, respectively, there is no evidence that either of these officers had authority to make or to ratify contracts. The letters themselves do not constitute a contract with decedent and inasmuch as no prior existing contract or agreement with anyone acting for the Government has been established, the letters mentioned cannot be held to be a ratification. The mere offer by Wright to some official of the United States of the use by the latter of his inventions certainly cannot be held to be a contract binding the United States to pay him any amount unless the offer is definitely accepted by the United States by some person duly authorized to act for it in that regard. This record does not establish that this was done. If there was any use of decedent's inventions it was an unauthorized use and therefore an infringement. This question is not now in the case. Plaintiff is not entitled to recover and the petition is dismissed.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THE SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C-531-(5). Decided March 7, 1938]

On the Proofs

Indian claims; obligation of Government under treaty limited to reasonable time.—The provisions of the treaty of 1868 between the Government and the plaintiff tribe of Indians for furnishing by the Government cows and oxen to families of the tribe who removed to the reservation, selected tracts of land and commenced farming, did not obligate the Government for an indefinite period, but only for a reasonable time.

The Reporter's statement of the case:

Mr. Richard B. Barker for the plaintiff. *Messrs. Case, Brewster, Ivins, Calhoun*, and *Cutler* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant.

In this case plaintiff seeks to recover $829,290 for the alleged failure of the United States to fulfill its alleged obligation under Art. 10 of a treaty entered into in 1868 to make appropriations and to expend the money for the purchase and delivery of cows and oxen for not less than 4,549 families who, it is alleged, removed to the reservation established by the treaty and commenced farming thereon within the meaning of the provisions of Art. 10. On July 15, 1879, the Congress, in compliance with Art. 10, made an appropriation of $126,000 for the purchase of "one American cow and one pair of American oxen for each lodge or family that commences farming, six hundred lodges, per same article, one hundred and twenty-six thousand dollars." The amount thus appropriated was expended by the Secretary of the Interior for the purposes mentioned during the years 1873 to 1880, inclusive, as will be shown in detail hereinafter in the findings.

The defendant denies any further responsibility or obligation for the reasons (1) that the obligation assumed under Art. 10 was to continue only for a reasonable time—that is, such reasonable time as would permit the Indians, party to the treaty, to remove to the reservation and commence farming; (2) that during the period from 1868 to 1880 the Secretary of the Interior furnished cows and oxen to those families who, during that time, commenced farming on the reservation specified in the treaty, and the facts do not establish any further obligation in this respect on the part of the United States; and (3) that the provisions of Art. 10 and the obligation of the United States thereunder to furnish cows and oxen to such lodges or families as settled upon the reservation and commenced farming should be construed in the light of Arts. 6 and 8 which clearly define the meaning of the term "to commence farming."

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. By an act approved June 3, 1920, 41 Stat. 738, Congress authorized the plaintiff tribe to bring suit in this court for the determination of the amount, if any, due the tribe under any treaties, agreements, or laws of Congress. Several amended petitions with reference to each question raised by the tribe were filed in 1934 and thereafter this case was tried and submitted.

2. In 1868 a treaty was concluded between the United States and the various bands of the Sioux Nation comprising the plaintiff herein. The treaty was signed by the Indian bands at various dates from April 29, 1868, to November 6, 1868; was ratified by the Senate of the United States on February 16, 1869, and proclaimed by the President on February 24, 1869, 15 Stat. 635.

By Article 2 of this treaty a certain described district of country was set apart "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them."

By Article 6 it was provided that if any individual among the said Indians, being the head of a family, should desire to commence farming he should have the privilege of selecting a tract of land within the reservation not exceeding 320 acres in extent and that any person over eighteen years of age, not being the head of a family, might select in like manner for purposes of cultivation a quantity of land not exceeding 80 acres in extent.

By Article 8 it was provided that when the head of a family or lodge should have selected lands as provided in Article 6, and the agent was satisfied that he intended in good faith to commence cultivating the soil for a living, he should receive certain supplies of seeds and agricultural implements.

By Article 10 it was provided, among other things:

> And it is stipulated that the United States will furnish and deliver to each lodge of Indians or family of

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persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

By Article 11 the Indian parties to the treaty relinquished all right to occupy permanently the territory outside of the reservation, but reserved the right 'to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase."

By Article 15 the Indians agreed that when the agency house referred to in Article 4 was constructed they would regard the reservation as their permanent home, and would make no permanent settlement elsewhere but would have the right to hunt as stipulated in Article 11.

3. By an agreement entered into between the United States and the Oglala Sioux under Red Cloud and the Brulé Sioux under Spotted Tail on June 23, 1875, these Indians, for a consideration, relinquished "all privileges of hunting and all other rights and privileges in Nebraska and on the Republican Fork of the Smoky Hill River" secured to them in the treaty of 1868, restricting the surrender, however, insofar as rights and privileges in Nebraska were concerned, to lands therein south of the divide of the Niobrara River.

4. By the agreement of September and October, 1876, between the United States and the plaintiff Indians, ratified in the act of February 28, 1877, 19 Stat. 254, the Sioux tribe made a further cession of lands to the United States, relinquished all privileges of hunting outside the reservation, and declared Article 16 of the treaty of 1868 to be abrogated.

5. In the years immediately following the treaty of 1868 there was little change in the mode of life of the Sioux Indians. Only a few of them complied with the provisions of the treaty and settled at the various agencies along the Missouri River. The great bulk continued to roam as before over their vast reservation. Large numbers of them, variously estimated at from 3,000 to 8,000, in violation of their

treaty agreement, took up their permanent residence in the valley of the Yellowstone River outside of the "unceded Indian territory," where they maintained a hostile and rebellious attitude toward the Government and resisted all efforts to induce them to reside within the limits of the reservation. Such of them as resided, more or less permanently, at the agencies, adopted such a hostile, truculent, and rebellious attitude towards the Government officials, that in 1873 the Commissioner of Indian Affairs was compelled to recommend that military posts be established at each of the agencies so as to enable the agents to conduct affairs in an orderly manner.

In addition to the Sioux, who had taken up their residence in the valley of the Yellowstone, the thousands of Oglalas under Red Cloud and the thousands of Brulés under Spotted Tail, who together composed more than one-half of the total Sioux population, refused to take up their residence upon the reservation and, in violation of their treaty promise, maintained their permanent homes in Wyoming and Nebraska.

War finally broke out between the Government and the Sioux located in the valley of the Yellowstone. During the progress of the war the hostiles received such large accessions from the different agencies that the number remaining thereat was reduced to about one-third of what it had been. The war commenced on March 17, 1876, and continued until September 10, 1877. The number of warriors in the field was estimated by the Secretary of War to be from 2,500 to 3,000. After the cessation of hostilities the majority of the hostiles returned to the agencies, but Sitting Bull, one of the leaders, and his followers, numbering nearly 3,000, did not return thereto until July 1881.

Ignoring the provisions of the agreements of June 1875 and September 1876, the Sioux under Red Cloud and Spotted Tail persisted in living outside the reservation and refused to take up their abode thereon. However, in August 1878, as a result of efforts by a second commission appointed for the purpose, these Indians consented to go upon the reser-

vation, the Oglalas being located at the present Pine Ridge agency and the Brulés at the present Rosebud agency.

6. In compliance with the stipulation in Article 10 of the treaty of 1868, quoted in Finding 2, the Congress in the act of July 15, 1870, 16 Stat. 335, 353, made the following appropriation:

> For purchase of one American cow and one pair of American oxen for each lodge or family that commence(s) farming, six hundred lodges, per same article, one hundred and twenty-six thousand dollars.

The amount thus appropriated was expended during the years 1873 to 1880, inclusive, as detailed in the table below:

Agency	Purpose	Date furnished	Purchase price
Grand River	201 oxen	September 28, 1873	$15,075.00
	130 cows	do	5,200.00
	5 bulls	do	425.00
Upper Missouri	150 oxen	October 4, 1873	11,250.00
	264 cows	do	10,560.00
	11 bulls	do	1,225.00
Santee	100 oxen	October 8, 1873	7,500.00
	50 cows	do	2,000.00
	2 bulls	do	300.00
Cheyenne River	100 oxen	October 11, 1873	7,500.00
	99 cows	do	3,960.00
	4 bulls	do	475.00
Whetstone	57 oxen	October 13, 1873	4,275.00
	50 cows	do	2,000.00
	2 bulls	do	300.00
Grand River	Building corral	December 8, 1873	1,500.00
	300 tons of hay	December 10, 1873	6,600.00
Santee	1 yoke oxen with yoke	April 30, 1874	140.00
	3 yoke oxen with yokes and chains	April 8, 1874	390.00
	3 yoke oxen	June 19, 1874	390.00
	10 yoke oxen with yokes and chains	June 22, 1874	1,450.00
	11 yoke oxen with yokes	July 3, 1874	1,628.00
Cheyenne River	Advertising for cows and bulls	June 16, 1874	13.50
Grand River	300 tons hay	January 12, 1874	6,600.00
Standing Rock	250 cows	June 10, 1878	7,178.50
Crow Creek	288 heifers and 12 bulls	July 8, 1880	5,250.00
Cheyenne River	50 yoke oxen with yokes and chains	July 9, 1880	6,100.00
Pine Ridge	869 heifers and 39 bulls	June 30, 1880	[1] 7,436.00
Standing Rock	480 heifers and 20 bulls	July 27, 1880	9,250.00
			126,000.00

[1] The total cost of these heifers and bulls was $18,049.30, $7,436.00 of the amount being paid out of the balance remaining of the $126,000.00 and $10,613.30 out of the Osage "Civilization Fund." (See Rept., Compt. Genl., vol. 2, p. 805.)

No other appropriation on account of the stipulation of Art. 10 appears to have been made by the Congress.

The annual report of the Commissioner of Indian Affairs for 1886 digests the Indian Agencies' reports of the number

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of Indian families "engaged in agriculture" on the 1868 reservation, as follows:

Agency	Number of Indian families engaged in agriculture	Page citation of annual report
Cheyenne River	624	412
Crow Creek and Lower Brulé	332	412
Pine Ridge	673	414
Rosebud	1,120	414
Standing Rock	1,134	414
Fort Peck	408	418
Santee and Flandreau	258	418
Total	4,549	

The facts do not show the nature or extent of farming operations by each of the families shown in the Commissioner's report as being engaged in agriculture, but a division of the total number of acres reported as being cultivated at the various agencies on the reservation by the number of families reported as "engaged in agriculture" at such agencies, shows that the families at the Cheyenne River Agency cultivated 2.16 acres; at Crow Creek and Lower Brulé, 4.71 acres; at Pine Ridge, 2.11 acres; at Rosebud, 3.74 acres; at Standing Rock, 2.95 acres; at Fort Peck, 1.39 acres; and at the Santee and Flandreau Agency, 20.30 acres, or an average at all the agencies of 3.58 acres. The record does not show how many of the 4,549 families shown in the Commissioner's report as being engaged in agricultural operations selected farms and in good faith indicated an intent to commence cultivating the soil for a living, nor how many of such number of families were furnished cows and oxen during the period from 1870 to 1880.

Plaintiff tribe computes its claim by multiplying $210, claimed as the cost to the Government of delivering one cow and a pair of oxen to plaintiff Indians on the reservation, by 4,549, as the number of families engaged in agriculture in 1886, and deducts from the $955,290 thus obtained the amount of $126,000 appropriated and expended by the Government during the period 1870 to 1880 for the purchase and delivery of the cows and oxen to the Indian families who

commenced farming. The cost of the cows and oxen furnished the Indians during the period 1870 to 1880 under the appropriation of $126,000 made by Congress in 1870 was about $192 for one cow and two oxen; the balance making up the $210 claimed by plaintiff represented transportation and other expenses incident to the delivery of the cows and oxen to the Indians. The price of one cow and two oxen during the period 1883 to 1886 was not in excess of $150.

The court decided that the plaintiff was not entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

It is the position of the plaintiff that under the stipulation of Art. 10 of the 1868 Treaty with the Sioux Tribe of Indians the United States was obligated to furnish one cow and a pair of oxen to each and every family in the Sioux Tribe which removed to the reservation at any time and which, at any time thereafter, commenced to farm. Based on statistics from the report of the Commissioner of Indian Affairs for 1886 indicating that a total of 4,549 Indian families at the various agencies (including the Fort Peck Agency, the Indians which the defendant insists are not parties to this action) were "engaged in agriculture" during that year, the plaintiff contends that this is the number of families which was entitled to receive cows and oxen. On this basis it is contended that the Government incurred an obligation under Art. 10 of the treaty of $210 a family, or $955,290. After deducting the amount of $126,000 expended by the Government for the purposes mentioned under Art. 10, plaintiff seeks judgment for $829,290.

Defendant contends that the primary purpose of the Treaty of 1868, and particularly the stipulation of Art. 10, with reference to furnishing each family who commenced farming with one cow and two oxen was an added inducement to the tribe to abandon its nomadic life, settle upon the reservation, and at least make a start toward becoming self-sustaining; that the offer was open for acceptance by such families of the tribe as were already on the reservation or those who removed thereto within a reasonable time and

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who commenced to farm within a reasonable time. It is further contended that it was obviously not the intention of the treaty makers that this offer under Art. 10 was to remain open for acceptance at the whim of the Indians at any time in the future, but only within a reasonable time after ratification of the treaty; that the plain intention of the treaty was that removal to the reservation and commencement of farming should be practically coincident; that the stipulation was so understood and interpreted by the Government, and that this interpretation is justified and sustained when other provisions of the treaty relating to the same subject matter are considered. Finally it is contended by defendant that the record fails to show that the amount of $126,000 appropriated in July 1870 and expended by the Secretary of the Interior between that date and 1880 was not sufficient to supply such families with the animals agreed to be furnished as had, in good faith, accepted the offer contained in Art. 10 and had commenced farming within the meaning of the treaty.

We agree with the defendant in proposition (1) that the whole purpose of Art. 10 was to induce the Indians to remove and settle upon the reservation immediately or within a reasonable time; (2) that the period of ten years from 1870, when the Congress made the appropriation of $126,000 for the purpose of carrying out its stipulation under Art. 10, to 1883, when the amount of that appropriation had been expended by the Secretary of the Interior for the purposes for which it was appropriated, was a reasonable time for the Indians to remove to the reservation and commence farming, and that there was no binding obligation upon the Government, after such reasonable period, to furnish the Indians with cows and oxen or to pay the Indians in money the equivalent purchase price of a cow and two oxen for each family; whether, after such a reasonable time, the Government should furnish such families as commenced farming with cows and oxen was a matter within the discretion of Congress; (3) that the words "commence farming" used in Art. 10 of the Treaty must be interpreted by reference to Arts. 6 and 8 which define the term "to commence farming" and specify that which a head of a family shall do as indi-

cating a desire to commence farming. And (4) that the record does not show with any degree of certainty the number of lodges or families that commenced farming on the reservation at any of the agencies within a reasonable time after the ratification of the treaty in February 1869 and its proclamation by the President in the same month.

Proposition (1) above establishes only the underlying purpose of the Government undertaking stipulated in Art. 10. Finding 5 shows that it had little effect upon the majority of the Indians.

Proposition (2) is fully justified by the reasons for making the treaty and attempting to remove the Indians to a definitely defined reservation, and by all the circumstances surrounding the negotiation and the execution of the treaty. It seems clear from the record that the Congress regarded the period from the date of ratification of the treaty in 1869 until 1883, when the appropriation made for carrying out the provisions of Art. 10 of the treaty was exhausted, as a reasonable time within which the Indians might comply with the provisions of that article, and we can find nothing in the record or in the circumstances of the case that would justify this court in holding that a reasonable time extended to or beyond 1886. In February 1883 the Secretary of the Interior requested Congress to make an additional appropriation for the purchase of cows and oxen for the Sioux families "engaged in agriculture" on the reservation. There is no evidence that the families for which this appropriation was requested had commenced farming within the meaning of the treaty as we interpret it. Congress declined to make such an appropriation and no other appropriation, in addition to the amount of $126,000 appropriated in 1870, was ever made. Of course one party to a contract can not decline to carry it out with immunity but we think the reason for refusal of Congress to make a further appropriation was because it considered that the previous appropriation of $126,000 had discharged its obligation under Art. 10 with respect to the families that had removed to the reservation and commenced farming within a reasonable time. In the circumstances we cannot say that this conclusion of Congress was erroneous or in violation of the treaty.

Proposition 3 above relates to the intent and meaning of the provisions of Art. 10 and the extent of the Government's obligation thereunder. This provision of the treaty must be interpreted in the light of other provisions relating to the same subject. As will be seen from Art. 10, the United States stipulated that it would furnish and deliver to each lodge or family of persons legally incorporated with them, who should remove to the reservation and commence farming, one good American cow and one good well broken pair of American oxen within sixty days after such lodge or family should have settled upon such reservation. Standing alone this provision might be susceptible of the interpretation that any lodge or family covered by the treaty who at any time removed to the reservation and engaged in agriculture to any extent should within sixty days thereafter be entitled to receive from the Government one cow and two oxen. But we think it is clear that this article would not have been worded in such broad and general terms if the matter of what should constitute "commence farming" had not been dealt with in earlier articles of the treaty. In Art. 6 it was provided that if any individual among said Indians being the head of a family "should desire to commence farming" he should have the privilege of selecting a tract of land within the reservation not exceeding 320 acres in extent and that any person over eighteen years of age, not being the head of a family, might select in like manner for purposes of cultivation land not to exceed eighty acres in extent. In Art. 8 it was provided that when the head of a lodge or family should have selected lands, as provided in Art. 6, and the Indian agent was satisfied that such head of a lodge or family intended in good faith to commence cultivating the soil for a living, he should receive certain supplies of seeds and agricultural implements. Art. 10 then proceeded to provide, among other things, for cows and oxen. It is therefore clear, we think, from these three provisions of the treaty considered together that before an Indian lodge or family of persons legally incorporated with them should be regarded as having commenced farming within the meaning of Art. 10, the head of such lodge or family must have indicated his desire to do so by

selecting a tract of land as specified in Art. 6 and, after having selected such land, must have satisfied the Indian agent that he intended in good faith to commence cultivating the soil for a living; whereupon such lodge or family would be furnished a cow and two oxen as specified in Art. 10 and with seeds and agricultural implements as specified in Art. 8. That these articles must be read together for the purpose of interpreting the provisions of any one of them is clear from the fact that they all related to the same subject matter, namely, farming. A person cannot farm until he has selected his land. A cow was to be furnished on the condition that the lodge or family had a farm. Of course oxen would be of no value to an Indian lodge or family, the head of which had not selected a tract of land for farming purposes, and neither would oxen be of any use to an Indian family without agricultural implements and seeds for the purpose of raising crops in the cultivation of the soil.

With reference to proposition (4), hereinbefore mentioned, it appears that in 1886 the Commissioner of Indian Affairs set forth in his annual report a digest of certain reports of the Indian Agents indicating that at that time there were 4,549 entire families "engaged in agriculture," but an analysis of this statement upon information obtainable from the best available sources indicates that the number of acres being cultivated at each agency on the basis of the number of families at such agencies was very small. (See Finding 7.) Certainly with no more evidence than is disclosed by the Commissioner's report of 1886, it would be impossible to hold that the number of families mentioned as engaged in agriculture was, in the light of the facts just mentioned, engaged in farming within the meaning of Arts. 6, 8, and 10 of the treaty and, to such an extent, as to bind the United States to pay the 4,549 families the amount of $829,290 because they had not been furnished in 1886 with one cow and two oxen. Moreover, Art. 8 of the 1868 treaty with the plaintiff tribe provided that any person over eighteen years of age and not the head of a family might select a farm not exceeding eighty acres. In such a case the United States incurred no specific obligation to furnish cows and oxen to

ERRATUM

Plaintiff's motion for new trial pending in this case—*Martin* v. *U. S.*, No. E-154.

such persons separately from the heads of lodges or families, and it is not unreasonable to assume that the Indian agents in referring to the "number of Indian families engaged in agriculture" included Indians of a class just mentioned.

Counsel for defendant also makes the contention that under the provisions of the Jurisdictional Act this court is without jurisdiction to consider and determine the claims involved in this case for the reason that the Jurisdictional Act authorizes the court to consider and determine only claims for damages to the tribe as an entity and not to individual members thereof or to specific lodges or families of the tribe. Although we consider this contention not to be well founded it is unnecessary to discuss it in detail in view of our conclusions on other grounds that plaintiff is not entitled to recover. The petition is dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES V. MARTIN v. THE UNITED STATES

[No. E-154. Decided March 7, 1938]

On the Proofs

Patent for retractable landing gear for aircraft; infringement of patent.—Plaintiff's patent #1,306,768 held not to have been infringed.

Limitation by patentee's representation.—Representation made to secure a patent narrows the grant, operates as a limitation, and is binding on patentee; limitation not ineffective because unnecessary and self-imposed.

Invalidity of claims.—Plaintiff's claims 3, 10, 11, 13, 14, 17, 18, and 19 held to be invalid as involving no more than exercise of mechanical skill and are anticipated.

Opinion of experts; interpretations of terms.—Court is not bound by expressions of opinion by expert witness; terms employed to describe invention to be interpreted reasonably with reference to the art; imperfections are to be resolved in favor of the patent.

Non-exclusive license to use features of patent under Government contract.—Where plaintiff agreed to protect the Government

against use of all patent rights that might affect adoption or use of articles contracted for, plaintiff's patents held not to have been excluded and a non-exclusive license to the Government was established.

Infringement.—Plaintiff's claim 5 under patent in suit held to be a combination of old elements and plaintiff cannot claim infringement of use of only one element of the combination.

Nominal damages; Government liability.—Where a device, even if it technically infringes, is immediately discarded and destroyed as soon as manufactured, and is never used or sold, there can be only nominal damages, which this court cannot award; where a device was attached by a pilot on his own initiative, and without official knowledge or authority, the Government cannot be held liable.

The Reporter's statement of the case:

Mr. Theodore A. Hostetler for the plaintiff. *Mr. Norman H. Samuelson* was on the brief.

Mr. Samuel E. Darby, Jr., with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. J. F. Mothershead, Mr. Paul P. Stoutenburgh*, and *Mr. Frank H. Harmon* were on the brief.

Plaintiff alleges unauthorized use by the War and Navy Departments of the United States of a patent granted in 1919 for retractable landing gear for aircraft.

Defendant alleges several defenses, as follows: First, that plaintiff by his unsolicited and voluntary acts, and statements, during 1920, 1921, 1923, and 1924, is estopped to allege "unauthorized use" of his alleged patent by the War and Navy Departments; second, that plaintiff's sale of engineering information to the defendant on receipt of contracts 334 and 52031 included all of the patentable features of the patent in suit; third, that by reason of outstanding assignments plaintiff is not the owner of the subject matter of the claim; fourth, that the patent is invalid by reason of anticipation by, and want of patentable invention over the prior patented and published art; fifth, that none of the Government aeroplanes infringe the claims of plaintiff's patent, 1,306,768, if it is given an interpretation consistent with the disclosure of the specification and drawings "and

necessary to be given thereto in order to retain the slightest vestige of validity in view of the prior art."

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. An aeroplane in order to take off and land on the ground must be provided with a landing gear essentially comprising a pair of wheels mounted on struts or framework projecting downwardly from the fuselage. During the time when the aeroplane is in normal flight, such landing gear is of no utility and its presence acts to retard the progress of the plane through the air due to the wind resistance and drag of these parts.

By constructing the landing gear of an aeroplane so that it may be folded or retracted either adjacent to or within the fuselage of the aeroplane, this wind resistance or drag may be largely eliminated and the efficiency and speed of the aeroplane in flight thus increased.

A landing gear so constructed is known as a retractable landing gear, and the patent in suit relates to certain improvements in such a structure.

2. June 8, 1916, James V. Martin, the plaintiff in this case, filed in the United States Patent Office application #102576 for "An aircraft running and alighting device." This application was allowed on April 2, 1917, and became forfeited on October 2, 1917, through failure to make payment of the final fee within the six-month period allowed by law.

The application was renewed October 3, 1917, as application #194595 and matured into United States Letters Patent #1306768, the patent in suit, on June 17, 1919.

There is no satisfactory evidence of any date of invention prior to June 8, 1916, the filing date of the Martin application.

3. The plaintiff enrolled as, and was, a lieutenant in the Naval Reserve from March 21, 1918, until his discharge on February 7, 1920. During this time he served as a civilian employee of the Government from February 1 to May 8, 1919, and also served as an employee of the Emergency Fleet Corporation from May 1919, throughout the remainder of

the year. Martin was not in the employment or service of the United States Government at the time he invented the device covered by the patent in suit, nor was he in such employment or service when the petition in this case was filed March 11, 1925.

4. January 20, 1917, plaintiff entered into an agreement with one A. L. Garford, president of the Garford Manufacturing Company, as follows:

> This memorandum of agreement, entered into this 20th day of January 1917, by and between J. V. Martin and A. L. Garford, both of Elyria, Ohio, witnesseth:
>
> That, whereas, the said Martin is the owner of United States Letters Patent Numbers 538,910 (to be reinstated), 100,799, 102,576, covering improvements in aeroplanes, and United States Letters Patent Numbers 96,749 and 134,464, covering stabilizers for aeroplanes; and
>
> Whereas, the said Martin has borrowed certain sums of money aggregating $3,000 from Samuel Simmons and Julian C. Smith and has agreed to assign certain interests in the aforesaid letters patent as security for the repayment of said loans; and
>
> Whereas, the said Martin requires certain other sums of money to defray expenses of procuring patents and other expenses; and
>
> Whereas, the said Martin is desirous of procuring a competent and responsible manufacturer to build aeroplanes for the United States Government and stabilizers for aeroplanes under said patents; and
>
> Whereas, the said Garford is the president of The Garford Manufacturing Company, a corporation in all respects equipped to manufacture aeroplanes and aeroplane stabilizers; and
>
> Whereas, the said Garford is willing, under certain conditions, to advance the money necessary to repay the loans from Samuel Simmons and Julian C. Smith to the said Martin, in order that the title of said Martin to said patents may not be jeopardized, also to advance to said Martin other sums necessary to defray the expenses of procuring patents and other expenses:
>
> Now, therefore, in consideration of the foregoing and of the mutual benefits therefrom accruing, said parties have agreed, and by these presents do hereby agree and covenant, as follows:
>
> 1. The said Martin hereby grants to the said Garford an exclusive license under the letters patent hereinbe-

fore mentioned to manufacture and sell two (2) aeroplanes to the United States Government, all in a period of one (1) year from the date hereof.

2. The said Martin agrees to procure from the United States Government an offer to said The Garford Manufacturing Company to build and furnish two (2) aeroplanes under the patents hereinbefore mentioned, the same to be equipped with certain motors to be furnished by The Packard Motor Car Company of Detroit, Michigan, all complete for the sum of Sixty Thousand Dollars ($60,000.00) for each aeroplane, said The Packard Motor Car Company to receive for each motor furnished for each aeroplane a sum not to exceed Seventy-five hundred Dollars ($7,500.00), the same to be paid when such aeroplanes are accepted and paid for by the Government of the United States, said The Garford Manufacturing Company to be reimbursed its full manufacturing cost, including engineering, labor, materials, and administration expense, together with a profit thereon of One hundred per cent (100%), the said Martin to receive Fifteen percent (15%) and the said Garford Eighty-five percent (85%) of the net profit remaining after said The Garford Manufacturing Company and The Packard Motor Car Company shall have been paid as aforesaid.

3. The said Martin hereby grants to the said Garford an exclusive license under the letters patent hereinbefore mentioned to manufacture and sell stabilizers for aeroplanes to the number of Twenty-five hundred (2,500) sets, the same to be built by The Garford Manufacturing Company when and as orders are received for the same, and sold for not less than $1,000 per set nor more than $2,000 per set, The Garford Manufacturing Company to be reimbursed its full manufacturing cost, including engineering, labor, materials, and administration expense, together with a profit thereon of One hundred per cent (100%), the said Martin and the said Garford each to receive Fiftv per cent (50%) of the net profit remaining after said The Garford Manufacturing Company shall have been paid as aforesaid.

4. The said Martin agrees that he will hold the title to all of the patents hereinbefore mentioned, and will permit nothing to be done to vitiate or alienate the same during the period covered by this contract.

5. The said Martin agrees to furnish all drawings, plans, models, specifications, etc., necessary to build the aeroplanes and aeroplane stabilizers hereinbefore

mentioned, and further, that he will assist by way of supervision and inspection in the building of such aeroplanes and aeroplane stabilizers, and further, that he will furnish the purchasing department of The Garford Manufacturing Company all necessary information as to where materials suitable for the building of such aeroplanes and stabilizers can best be procured.

6. The said Martin further agrees that when the two aeroplanes referred to in Paragraph 2 hereof shall have been completed and accepted by the Government of the United States, if it shall then seem best to him to organize a corporation for the purpose of manufacturing and selling or exploiting his aeroplanes, that he will give to the said Garford an opportunity to organize and participate in such a corporation upon terms which shall be mutually satisfactory.

7. The said Garford agrees that he will procure an acceptance by said The Garford Manufacturing Company of the offer referred to in Paragraph 2 hereof, and that he will pay to the said Martin Fifteen per cent (15%) of the net profit accruing from the sale of the United States Government of two aeroplanes, all in accordance with the provisions of Paragraph 2 hereof.

8. The said Garford agrees that The Garford Manufacturing Company will manufacture stabilizers when and as ordered, in accordance with the provisions of Paragraph 3 hereof, and that he will pay to the said Martin Fifty per cent (50%) of the net profit accruing from the manufacture and sale of said stabilizers, said net profit to be determined in accordance with the provisions of Paragraph 3 hereof.

9. The said Garford agrees to advance, when required by the said Martin, not to exceed the following amounts and for the following purposes:

$3,000.00 to repay loans made by Samuel Simmons and Julian C. Smith; and

$300.00 for patent attorneys;

all of such advances to be repaid to the said Garford out of the first profits which shall accrue to the said Martin; also the sum of $1,000 approximately for sundry other matters in connection with the building and exploiting of aeroplanes and stabilizers, the full amount of such advances to be repaid to the said Garford out of the first joint profits accruing to the said Martin and Garford.

10. Both parties hereby agree to execute and to cause to be executed any and all papers and writings which

may be necessary to carry out any and all of the terms and provisions of this agreement.

5. In compliance with Article 10 of the Agreement set out above, Martin, on August 11, 1917, executed a conditional sale and agreement including and relating to the patent application which subsequently matured into the patent in suit. A copy of this conditional sale and agreement, which provided in part as follows, defendant's exhibit 41, is by reference made a part of this finding:

CONDITIONAL SALE AND AGREEMENT

All men witness: For One Dollar ($1.00), receipt whereof is hereby acknowledged, and other valuable considerations herein stipulated, I hereby sell, assign, and transfer an undivided one-third (⅓) equity in the following patents and patent applications:

Patents

* * * * *

3. Running and Lighting Gear—Filed June 8, 1916, No. 102,576.

* * * * *

To Mr. A. L. Garford of Elyria, Ohio.

This sale becomes effective automatically when—

1. The Martin Cruising Tractor Biplane now building for the United States Government by the said A. L. Garford, shall have been completed, and,

2. The said A. L. Garford shall have paid Three Thousand Dollars ($3,000.00) to clear the present assignments to Julian C. Smith and Samuel Simmons.

6. Condition 1 of the conditional sale and agreement was complied with—the Martin Cruising Tractor Biplane therein specified having been completed, accepted by the Government, and paid for.

There is no evidence that Garford ever paid the $3,000, or any part thereof, mentioned in condition 2 of the conditional sale and agreement, either to Martin or to the parties, Smith and Simmons, mentioned therein.

The books and records of the Garford Manufacturing Company are incomplete, some of the records having been destroyed. Fragmentary records still in existence show a

total sum of $4,978.50 paid in advances to Martin by the Garford Manufacturing Company from January 16, 1917, to June 29, 1918, which sum does not include certain items listed as expenses advanced to Martin. There is no satisfactory evidence as to what the advances covered or as to their specific purpose. Of this amount $2,460 was paid to Martin in weekly payments of $60. Martin was engaged in several separate transactions with the Garford Company and was not on a salary basis.

A receipt signed by the Garford Manufacturing Company, a copy of which, plaintiff's exhibit 27, is by reference made a part of this finding, shows that on February 9, 1920, the Garford Manufacturing Company had received from Martin a total of $56,332.90, which is $6,332.90 more than Martin's indebtedness of $50,000 to the Garford Manufacturing Company for the manufacture of the Martin Bomber.

There is no satisfactory evidence that either Garford personally or the Garford Manufacturing Company ever complied with condition 2 of the conditional sale and agreement.

The conditional sale and agreement was not filed for recording in the United States Patent Office by Garford until September 1931, fourteen years after the same had been executed, and it was then filed by Garford only after he had been interviewed and such action had been suggested to him by representatives of the Department of Justice.

7. Three concurrent transactions, each involving certain correspondence and agreements, relate to the question of license. The findings relating to each of the transactions are grouped as follows: (1) License Agreement; (2) War Department Contract #334; and (3) Navy Department Contracts.

(1) License Agreement

March 28, 1919, plaintiff initiated an attempt to give or sell to the Government certain rights pertaining to retractable chassis by sending a letter to the Secretary of War which, in part, reads as follows:

"Kindly place this letter on file as a record of my bona fide offer acceptable now or at any time in the future to give or sell for one dollar ($1.00) each to the United States War Department for Army use, the following airplane efficiency features which, as your records will show, have been freely at your disposal during the war.

> The retractable chassis.
> Shaft drive aeroplane power transmission.
> The K-bar cellule truss."

A photostat copy of the above letter, plaintiff's exhibit 30, is by reference made a part of this finding.

August 26, 1920, Captain R. H. Fleet, the contracting officer of the Engineering Division, Air Corps, War Department, wrote plaintiff a letter, which, so far as material here, was as follows:

> We wish to thank you for your offer of a license under your patents for retractable landing gears and improvements thereon. Your offer is hereby accepted and this office will forward a license to you in the course of a few days for execution, wherein the rights referred to in your letter are conveyed to the Government for the sum of One Dollar ($1.00).

September 8, 1920, a license was forwarded to the plaintiff, together with a letter signed by Captain Fleet, the contracting officer of the Air Corps, as follows:

> Subject: License for Retractible Chassis.
>
> 1. Receipt is acknowledged of your letter of September 2, with inclosures. The license has been re-drawn so as to provide that the rights conveyed to the Government are for military and naval purposes only. This office will notify the Navy Department that such rights have been secured for it. The payment of $1.00 will be made by this Division.
>
> 2. Three (3) copies of the license are herewith inclosed for execution by yourself. You may retain one copy and return to this office two of the copies after you have signed the same and had same acknowledged before a Notary Public. The acknowledgment is not really required, but this office deems it desirable to have it acknowledged for the purpose of recording in the Patent Office.

3. A formal acceptance on the face of the license is not necessary in order to make the same valid as the payment of one dollar ($1.00) will form the consideration for the granting of the license. This office will be glad to write you a letter, however, after you have executed the license, stating that the same has been accepted.

8. September 20, 1920, plaintiff signed, sealed, and acknowledged and delivered to the contracting officer of the Engineering Division, Air Service, War Department, a license agreement relating to the patent in suit, as follows:

License

Whereas, I, James V. Martin, of Dayton, Ohio, have invented certain retractable landing gears for airplanes for which Letters Patent of the United States, No. 1,306,768, have heretofore been issued to me; and

Whereas, I have invented certain shock-absorbing wheels for airplanes and certain improvements in retractable landing gears for airplanes, and have heretofore made application to the United States Patent Office for patents covering said inventions; and

Whereas, I desire to sell to the United States of America a nonexclusive right and license to make, have made, use and sell all of said inventions, for military and naval purposes, and the United States of America desires to secure such rights:

Now, therefore, in consideration of the premises and of the sum of One Dollar ($1.00) paid by the United States of America to me, the receipt of which is hereby acknowledged, I do hereby grant to the United States of America, the irrevocable but non-exclusive right and license to make, have made, use and sell, for military and naval purposes only, the said invention described in the specification on said Patent No. 1,306,768, and to make, have made, use and sell, for military and naval purposes only, any and all other inventions and improvements of shock-absorbing airplane wheels and retractable landing gears for airplanes as may have been heretofore, or may be hereafter, made, perfected, or devised by me. Said right and license, or licenses, shall extend throughout the United States and its territories, and shall remain in force and effect for the full period of said patents or other rights.

In witness whereof, I have executed the foregoing instrument this 20th day of September 1920.

Witnesses:

(s.) DANIEL F. NUYRUT.
(s.) HORACE KEANE.
(s.) JAMES V. MARTIN. [SEAL]
Washington, D. C.

Accepted for the War Department.

By ___________________,
Washington, D. C.

Accepted for the Navy Department.

By ___________________

STATE OF NEW YORK,
County of New York, ss:

On this 20 day of September 1920, before me, a Notary Public in and for the State and County of New York, duly came and appeared James V. Martin, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed said instrument for the uses and purposes therein expressed.

In witness whereof, I have hereunto affixed my hand and official seal at the City, County, and State of New York, the day and year above written.

(s.) DANIEL F. NUYRUT,
Notary Public New York County,
State of New York.

My commission expires March 30, 1921.

September 24, 1920, Fleet, the contracting officer of the Air Service, acknowledged the receipt of the license by the following letter in which was enclosed a voucher for $1.00, and a copy of the letter from the contracting officer to the Adjutant General of the Army, Washington, D. C. These letters are as follows:

To: Mr. James V. Martin, Room 612, 280 Madison Ave., New York City.

Subject: License to the Government.

1. This Division acknowledges two originals of the non-exclusive license which you are giving to the Government for military and naval purposes in connection with your retractable landing gear and shock-absorbing airplane wheel.

2. Inclosed is a voucher in the sum of $1.00 for you to sign and return to this office, so that it may make the proper disbursement.

3. Also enclosed is a copy of a letter this day written to the Adjutant General of the Army, which is self explanatory.

4. This Division desires to thank you for your unsolicited action in this matter.

(s.) R. H. FLEET,
Captain, A. S.

To: The Adjutant General of the Army, Washington, D. C. (Thru Channels).

Subject: License under Patent 1,306,768 (Shock-absorbing Airplane Wheels and Retractable Airplane Landing Gears).

1. Herewith find two originals of a license received from James V. Martin under his patent 1,306,768 covering the irrevocable but non-exclusive right and license from him to make, have made, use, and sell, for military and naval purposes only, certain shock-absorbing wheels and retractable landing gears for airplanes.

2. It is requested that the Secretary of War indorse the acceptance of the War Department on both originals and transmit them to the Secretary of the Navy for the same purpose, returning the two originals thereupon to this office, whereupon one original will be sent to Mr. Martin with a check for $1.00, the consideration, and the other copy will be kept in the records of the Air Service at this Division.

3. Since this Division considers that both of these inventions are of a military and naval value to the country, it is recommended that the Secretary of War and the Secretary of Navy each write Mr. Martin, thanking him for his tenure of this license to the Government for military and naval purposes at the nominal sum of $1.00.

R. H. FLEET,
Captain, A. S.

September 24, 1920, plaintiff wrote Col. T. H. Bane, Chief, Engineering Division, Air Service, as follows:

No doubt Major Fleet has told you that I have signed the sale and assignment of my Retractable Chassis and Shock Asorbing Wheel patents to the Army and Navy for one dollar.

I feel sure you will accept this act as proof of my desire to work in entire accord with your organization

for the efficient development of airplanes. The patents mentioned above have cost no less than three thousand dollars in prosecution and the engineering work I have done on retractable chassis will come to quite twelve thousand dollars; I mention this in order that you may not think lightly of my deliberate gift of these patents to the Army and Navy.

In addition to the assignment of the patents, I wish to place my personal services at your disposal with much engineering data relating to successful types of retractable chassis and to beg you to use these as you may see fit.

I shall be glad to design retractable chassis for you or for any prospective bidder and can furnish you, without cost, a tentative layout using any desired relation of wheels to fuselage or wings and provided with standard or wheel-type shock absorbers.

I am spending nearly all my time (and heaps of money!) developing and refining the shock absorbing wheels to meet your special needs and shall come to McCook Field for conference, bringing such layouts as you desire.

Hoping that I shall be able to convince you of my ability and sincerity, I remain,

On the same day plaintiff wrote Brigadier General Wm. Mitchell, Assistant Chief of the Air Service, as follows:

I have now signed the sale and assignment of my chassis and shock absorbing wheel patents for army and navy use for one dollar. The document was mailed to the Engineering Division, Air Service, McCook Field, Dayton, Ohio.

This action will save our government from just claims for royalties on account of any kind of Retractable Chassis, as my patents are very complete, and the state of the art to such that no claims broader than mine are valid.

I was very glad to learn that you were well impressed with the possibility of using retractable chassis on all jobs where a material increase of speed could be obtained without impractical structure, and I wish to assure you that my five years' experience and study of this special problem enables me to adapt retractable chassis to most designs without increase of weight or other complications.

I have placed my services in this connection at the disposal of Col. T. H. Bane, and shall very much ap-

preciate any help which you care to give: Kindly let me have a letter expressing the attitude of Operations to this important innovation, and please feel at liberty to call upon me at any time I can serve the Air Service.

To the above letter General Mitchell replied October 1, 1920, as follows:

I have just received your letter of the 24th instant, and hasten to tell you how much I appreciate the information therein contained. Your attitude not only in giving away the rights for the retractable landing chassis, but in offering at the same time your services, is fully appreciated, and exactly in line with the spirit and energy you have always displayed in the furtherance of aeronautics in this country.

Up to date there has been little necessity for your design, but with the increase in speed of planes, and the necessity for procuring planes that will land first on snow and then on grass in the course of the same flight, the retractable principle must be employed. Besides, with the "drive" for reduction in parasitic resistance now being considered by all designers, as evidenced in the thick winged internally braced monoplane construction, there will be another call for your landing gear, especially in long flights.

I trust that the government may be able to show its appreciation of your generosity in the very near future by the introduction of this gear into such designs as possible, and that by its introduction in military planes the commercial will follow.

9. February 18, 1921, the license agreement was returned to Martin, with the spaces for the signatures of acceptance by the War Department and the Navy Department unindorsed and unsigned, together with the voucher for $1.00 which Martin had previously signed and forwarded for payment. The letter accompanying the rejected license was signed by H. D. Schnacke, Acting Business Manager, Air Service, and was as follows:

1. The Patent Section of the Air Service has made an investigation of your patent No. 1,306,768 covering aircraft running and alighting devices. It is the opinion of the Patent Section that it would be inadvisable for the United States to accept a license under this patent, even for a nominal consideration, for the reason that the legal effect of such an acceptance might be to

give this patent certain artificial values which our patent experts do not think it is entitled to have.

2. For your information there is a well-recognized principle of patent law that a licensee under a patent is estopped from questioning the validity of the patent under which the license is granted. The Patent Section believes that your patent is of very limited scope and of doubted validity, and for that reason it is not believed advisable to accept a license under your patent on account of the estoppels which would result by reason of such action. Your licenses are therefore herewith returned, together with a voucher for one dollar presented by you some time last Fall.

March 12, 1921, plaintiff sent a letter relating to the return of the license to the Chief of the Engineering Division, Air Service, War Department, as follows:

I am in recepit of a letter under date of Feb. 18th, last from your acting business Manager, F. D. Schnacke transmitting therewith two copies of the license which I executed in favor of the United States Government on the twentieth day of Sept. 1920, for all my retractable chassis and shock-absorbing wheel patents for military and naval purposes only. There was also inclosed returned voucher for one dollar covering payment for patent 1,306,786 and other patents.

I wish to understand clearly the status of the present relation of my chassis and wheel patents to the Government so far as you are concerned, i. e. was the return of the license and voucher done with your consent and approval and as a result of such return by your order am I to understand that the Government has no title or right in my patents above referred to and as conveyed by me in the license returned to me?

You will naturally understand my desire to be certain of the status of so important a matter as the transfer of the patent rights above referred to which I value at ten million dollars.

This letter was answered March 25, 1921, by R. H. Fleet, the contracting officer of the Engineering Division, Air Service, War Department, as follows:

1. Your letter of the 12th instant, addressed to Colonel Bane, has been referred to this office for reply. In the matter involved in the acceptance or non-acceptance of your license, this office was guided by the ad-

vice of the Patent Section of the Air Service. The papers referred to in your letter of the 12th instant were not returned with the personal knowledge of the Chief of this Division, but you may rest assured that such return was properly authorized.

2. You are correct in your understanding that the Air Service has declined to accept a license under your patent No. 1,306,786 and applications pending. The grounds for this action are as follows:

(a) An investigation has determined that your patent No. 1,306,786 is of doubtful validity;

(b) An acceptance of a license under that patent would estop the United States from contesting its validity and tend to give it an artificial value to which, in the opinion of our patent experts, it is not entitled;

(c) Since the license you propose to give the United States runs only for army and navy purposes, other branches of the Government are excluded therefrom, and if the Government should accept your license and thus should permit itself to be legally estopped from contesting the validity of the patent, the Government's rights would be prejudiced, should it ever be alleged that branches of the Government other than the army and navy infringe thereon;

(d) While the Government has never infringed your patent, still it would be inadvisable for the Government to put itself in the position of being estopped from contesting the validity of the patent, should any infringement ever be alleged to have occurred prior to the date of the license.

(2) War Department Contract #334

10. September 15, 1920, the Engineering Division, United States Air Service, McCook Field, Dayton, Ohio, addressed and forwarded to aeroplane designers in the United States, including the plaintiff, a circular letter inviting submission of original designs of aeroplanes having certain, more or less, general specifications. The circular letter contained the following statement:

* * * The said payments for any design shall, without further consideration, convey to the Government, the non-exclusive ownership of that design, together with the right to the Government to use the same and all the information and data furnished, in any manner deemed advisable by the Government.

Copies of this circular letter and the specifications, defendant's exhibits 15 and 16, are by reference made a part of this finding. In response to the circular letter the plaintiff submitted to the Engineering Division a design of a single-seater pursuant aeroplane, which design comprised drawings and specifications. The design submitted incorporated as one of its features a retractable chassis. The specifications state on page 4 thereof with respect to this chassis that "The chassis is completely housed in the fuselage when in the retracted position." On page 8 of the specifications under the item "Fuselage," the following is stated:

> The transverse bracing in the fuselage at the points where the landing gear folds up is a metal diaphragm carried down from the upper longeron and attached to the struts. In this way the chassis is permitted to fold inside the fuselage without weakening any of its members.

Under the heading "Retractable Chassis" on page 8, the following subject-matter is found:

> The Retractable Chassis, invention of Mr. James V. Martin, has been incorporated in this design in a simple and practical form, combining the following features:
>
> (1) A distance between wheel centers greater than the average.
>
> (2) Safety factor is greater than the average.
>
> (3) Landing angle of 14° and ample propeller clearance.
>
> (4) Reliable and quick method of automatically raising and lowering the chassis. Experience in designing and building practical chassis which insures a practical job.
>
> The axle of the wheel is rigidly fixed to the V Struts in the front elevation, these struts being hinged to the fuselage. The rear strut is fixed to a nut on the worm shaft which is operated either by a hand wheel or from a disc clutch which is attached to the rear of the motor, and controlled by the pilot.
>
> The chassis is returned to its landing position by a spring mechanism that is automatically wound as the chasis is retracted. This spring mechanism is attached to the top of the worm shaft, as shown on Drawing No. 1057-2 and 1057-5.

This machine is equipped with a Martin 26 x 4 wheel with the shock absorber mechanism incorporated within the wheel.

The drawings disclose a retractable chassis folding inside of the fuselage in accord with the descriptive matter contained in the specifications.

While there is identity existing between the disclosure of the patent in suit and the design submitted by the plaintiff Martin, such identity is present only as to the broad feature of a landing gear having a chassis hinged to the fuselage and folding rearwardly.

Neither the specifications nor the drawings of the design submitted by plaintiff in response to circular of September 15, 1920, disclose any of the following features of the patent in suit: (a) a closure for apertures in which the chassis is housed or enters the fuselage; (b) the chassis being formed to close said opening when in a retracted position and form, with the sheathing of the fuselage, a substantially continuous outer fuselage surface; (c) automatic means for closing said sheathing; (d) for automatically closing or opening said sheathing operable simultaneously with the projection and retraction of the chassis; (e) a swinging frame, an axle rigid therewith, a single diagonal for tensile and concussion shearing stress, in combination with shock absorbing means supporting the main portion of the aeroplane on the chassis frame. None of the claims in suit of the Martin patent #1,306,768, is readable upon the design as submitted by Martin.

A certified copy of the specifications and drawings submitted by Martin, defendant's exhibit D-17, is by reference made a part of this finding.

11. December 11, 1920, a formal written contract was entered into and executed between James V. Martin and the United States by which the design submitted by Martin referred to in the previous finding was sold to the Government. This contract contained the following clauses:

Article I.—The Contractor hereby sells, transfers, and conveys to the Government, his original design of Single Seater Pursuit Airplane with air-cooled engine and all the engineering data, drawings and information therefor as delivered to the Engineering Division, Air

Service, on or about November 15, 1920, and now in the possession of said Division, together with the unrestricted right to use the said design, or any portion or feature thereof, and all said engineering data, drawings, and information in any manner deemed advisable by the Government, for the development, modification, or perfection of the type specified herein. Copies of said circular proposal and specification are attached hereto and made a part hereof.

Article II.—The Government shall forthwith pay the Contractor the sum of Twenty-five Hundred ($2,500.00) Dollars for said design and all of said data, drawings, and information mentioned in Article I hereof.

Article III.—The Contractor agrees to grant, and by the execution of this contract does grant, to the Government, without further consideration, the irrevocable but nonexclusive right and license to make, have made, use, and sell, for governmental purposes, any and all airplanes and/or parts thereof, of the type designed by the Contractor hereunder, and to practice or cause to be practiced any and all discoveries, inventions, improvements, and/or suggestions that have been or may be made, perfected, or devised by the Contractor, his representatives, employes, or other cooperators in connection with or incident to, or in any manner used in, the design furnished by the Contractor hereunder, under any and all patents and/or other rights based upon such discoveries, inventions, improvements, and suggestions. Said right and license shall extend throughout the United States and its territories, and shall remain in full force and effect for the full period of the term or terms of said patents or other rights.

Plaintiff was duly paid $2,500 by the United States in accordance with the provisions of this contract. The contract, defendant's exhibit 10, is by reference made a part of this finding.

(3) Navy Department Contracts

12. July 7, 1920, plaintiff made an offer in writing to the Chief of the Bureau of Construction and Repair, United States Navy, in which he offered to furnish one set of working drawings of the Martin retractable chassis and shock-absorbing rudder, together with a complete stress

analysis, for $3,000, and plaintiff further offered to construct and test the chassis frame which was to be designed and to furnish the testing equipment for an additional $2,000.

In this written offer plaintiff stated, with respect to patent rights, as follows:

> The prices quoted above are to cover estimated cost of labor and material in completing the engineering, computing, building, and testing involved, and do not comprehend any payment on account of patent rights, license for future construction, etc. However, I beg to call to the Bureau's attention my consistent policy of holding my patents, engineering data and service freely at the disposal of our Government, and I offer to sell the non-exclusive rights in any and all of my patents, to our Government for One Dollar each.

This offer, defendant's exhibit 28, is by reference made a part of this finding. The offer was renewed, in substance, under date of September 11, 1920.

Following the offers, plaintiff, on October 28, 1920, entered into contract #52031 with the United States. This was subsequent to the execution by Martin of the patent license referred to in finding 8, and prior to the return of said license as referred to in finding 9. This contract included in its terms, the following:

> 1. It is expressly understood and agreed that there will be furnished and delivered at the contractor's risk and expense, at the place and within the time stated for each class, and at the price set opposite each item, the articles or services listed therein.
>
> 4. The contractor shall indemnify the United States, and all officers and agents thereof, for all liability incurred of any nature or kind on account of the infringement of any copyright or patent rights granted by the United States that may affect the adoption or use of the article contracted for or the work done under this contract.

The contract further called for the delivery by plaintiff to the Navy Department of the following:

1 Set of Vandykes showing detail design of Retractable Chassis adapted to VE-7 plane including the alterations necessary on VE-7 plane; stress analysis of the chassis including altered parts of VE-7.

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1 Set of Vandykes showing Shock Absorbing Rudder and Empennage Alterations on VE-7 plane	$3, 000. 00
The above item includes a stress analysis showing a calculated safety factor in excess of seven against side loads, assuming one wing tip touching the ground.	
Construction of one complete and workable "Retractable Chassis" in accordance with the above mentioned plans. Work is not to commence until said plans have been submitted and approved by the Bureau of Construction and Repair	$3, 000. 00
Grand Total	$6, 000. 00

A vandyke is an engineering drawing of such a character that additional working blueprints may be readily produced therefrom.

The articles mentioned were delivered to the Navy Department and plaintiff received payment therefor. A copy of this contract, defendant's exhibit 6, and a copy of the drawings or vandykes furnished thereunder, defendant's exhibit 1, are by reference made a part of this finding.

13. The retractable chasis design incorporated in the set of vandykes furnished the United States under contract #52031 included the following features disclosed and claimed in the Martin patent #1,306,768 in suit: (a) a folding or retractable chassis frame, the cross-section of the members of which is such that the lower surfaces thereof are substantially flat and form substantially flush continuation of the lower surface of the fuselage when the chassis is retracted; (b) a fuselage sheathing having slots in which the landing chassis folds, the form and shape of the chassis being of such a nature as to automatically and substantially close the fuselage sheathing when the chassis is folded or in a retracted position.

The submitted design does not disclose or possess the following features which form part of the disclosure and subject-matter of the claims of the patent in suit: (a) means for closing the sheathing or opening of the fuselage when the chassis is in an extended or landing position; (b) a single frame, an axle rigid therewith, a single diagonal for tensile and concussion shearing stress, and shock absorbing means supporting the main position of the aeroplane on the chassis frame.

The phraseology of claims 3, 10, 11, 12, 13, 14, 15, 17, and 18, of the patent in suit is readable upon the design incorporated in the set of vandykes.

14. Shortly prior to April 26, 1921, the Navy Department made available to aeroplane manufacturers and designers in the United States a design, Schedule #7952, calling for the submission of a design for a single-seater shipboard aeroplane. Items 3 and 6 of this Schedule are as follows:

> 3. To bidders (not exceeding five), who furnish the complete information called for hereinafter and whose designs are considered meritorious, the Department agrees to pay for the design two thousand dollars ($2,000.00). If payment of $2,000.00 is made at time of acceptance of bid, no payment will be made for ITEM I. Bidders may submit one or more designs, but each must be complete and not more than one payment will be made to any one bidder.
>
> * * * * *
>
> 6. The purchase of a design by the Department will convey to the Government the non-exclusive ownership of that design together with the right to use the same and all information furnished in any manner desired except that the design will not be accepted and payment will not be made until corrections required by the Department have been made.
>
> A copy of this Schedule, defendant's exhibit 11, is by reference made a part of this finding.

15. April 27, 1921, plaintiff wrote the following letter to the Navy Department:

> Subject, Patent Rights under Naval Contracts.
>
> Information is respectfully requested as to the force and scope of that portion of a Navy contract which stipulates the conditions of non-exclusive ownership of a design involving patents of alleged value.
>
> Schedule 7953, for necessary aircraft, issued by the Bureau of Construction and Repair and Engineering provides for certain payments for aircraft design work and computations and on Page 3, paragraph 6 of said schedule the following occurs: "The purchase of a design by the Department will convey to the Government the Non-exclusive ownership of that design together with the right to use the same and all information furnished in any manner desired ——."

Does the payment made include a payment for patent rights? If so what portion of the payment is for such patent rights and what portion for draughtsmen, labor, etc.?

Should the Bidder not desire to sell his patent rights for the sum determined by the government, would he be debarred from receiving payment for the other valuable deliveries under the contract?

In former schedules the wording has been "convey to the Department" it is now changed to "convey to the government" does this mean that the Department may set a value upon one or more patent rights and then compel a bidder who owns patents involved in the design either to accept the Department's offer for the patent rights or else be denied an opportunity to bid?

The writer has many valuable aeroplane patents which he has always held freely at the disposal of the Government for Naval and Military uses, however unless the language of the proposed contract is especially restricted commercial use could be made of the writer's patent by the Post Office Department or by a Civil Aviation Director of the Department of Commerce.

Attention is respectfully invited to the recommendation by the National Advisory Committee for Aeronautics that inventors be encouraged, and the purpose of our government in granting patents as set forth in the constitution of the United States, and it is respectfully urged that the status of an inventor whose devices are accepted by a department be made clear.

June 22, 1921, the Assistant Secretary of the Navy replied to Martin's letter as follows:

Referring to your letter of the 26th of April last asking for information relative to the purpose and the interpretation of Schedule No. 7952 and proposals submitted thereunder, I enclose herewith extracts from reports made by the Bureaus of Construction and Repair and Engineering in answer to the Department's reference of your letter to them.

These extracts supply, it is believed, the information sought by your inquiries.

The second endorsement was, in part, as follows:

From: Bureau of Construction and Repair.
To: The Secretary of the Navy, via Bur. Engineering.
Subject: Schedule 7952—Single-Seater Airplanes for Shipboard Use. (Letter from Mr. J. V. Martin dated April 26th, 1921).

1. Schedule 7952 calls for the supply of single-seater airplanes for shipboard use. The schedule contains a provision, which is an innovation so far as the Navy Department is concerned, providing that to bidders (not exceeding five) who furnish certain information called for in the schedule and whose designs are considered meritorious, the Department will pay for the design $2,000. This purchase of the design is to convey to the Government the non-exclusive ownership of that design, together with the right to use the same and all information furnished in any manner desired. This provision was inserted after being tried successfully in a number of War Department airplane contracts, and after being subsequently considered and recommended by the Aeronautical Board to the Secretaries of War and Navy Departments, who approved its use. It amounts to a recognition of the trouble and expense imposed on an airplane designer or manufacturer if he is to submit a bid so complete that an intelligent appraisal of the design can be made.

2. It is the intent of this provision to secure for the Government the non-exclusive right to use the design, or any part of it, in any manner that seems proper. The price of $2,000 was fixed without any reference to the value of patents that may be included in the design, and is a reasonable compensation for the expense connected in preparing the bid for this type of airplanes. It is not obligatory on a bidder that he accept the payment. If a bidder submits a design which contains features so valuable that he considers payment for the design, and thus the conveyance to the Government of non-exclusive ownership in the design, is not to his interests he has the alternative of declining to accept payment for the design and this fact alone does not preclude his bid from consideration so far as an order for building airplanes to this design is concerned.

3. It is noted Mr. Martin draws a distinction between "Government" and "Department." It is considered that "Government" is the proper term. * * *.

A copy of this communication, defendant's exhibit 14, is by reference made a part of this finding.

16. In accordance with Schedule #7952 referred to in the preceding finding, an aeroplane design was submitted May 29, 1921, to the Navy Department by the Martin Aeroplane Factory of Garden City, Long Island, N. Y. In the specification accompanying the design the following references are

made to landing gear: On page 1 under "General Characteristics" it is stated that "The Machine is equipped with collapsible, retractable float, and retractable chassis. * * * The plane is equipped with a very simple and rugged retractable chassis similar to the one designed and built for the V. E. 7 by Captain James V. Martin." On page 3 it is stated: "The chassis may be either fixed or retractable as desired." Other than the quoted portions, the written specifications contained no reference to the construction or details of a retractable chassis. None of the nine (9) sheets of drawings discloses any of the constructional details of a retractable chassis.

Neither the specifications nor the drawings of the design disclose any of the following features of the patent in suit: (a) a closure for the apertures in which the chassis is housed or enters the fuselage; (b) the chassis being formed to close said opening when in a retracted position and form, with the sheathing of the fuselage, a substantially continuous outer fuselage surface; (c) automatic means for closing said sheathing; (d) for automatically closing or opening said sheathing operable simultaneously with the projection and retraction of the chassis; (e) a swinging frame, an axle rigid therewith, a single diagonal for tensile and concussion shearing stress, and shock absorbing means supporting the main portion of the aeroplane on the chassis frame. None of the claims in suit of the Martin patent #1,306,768 is readable upon the design as submitted by Martin.

A copy of the specifications and drawings of the submitted design, defendant's exhibit 12, is by reference made a part of this finding.

17. May 24, 1921, and subsequent to the return of the license agreement as set forth in finding 9, a contract was entered into between the Paymaster General of the Navy and the Martin Aeroplane Factory by James V. Martin, Proprietor, which contract covered the purchase of the submitted design referred to in finding 16 for $2,000, which consideration was accepted by plaintiff. Such consideration, however, was not accepted by plaintiff until Schedule #7952, embodied in and forming a portion of the contract, had been

altered at the suggestion and request of plaintiff, as indicated in this finding.

June 23, 1921, plaintiff sent the following letter to the Navy Department relative to the above-referred-to alteration in the contract:

> The BUREAU OF SUPPLIES AND ACCOUNTS,
> *Care of the Bureau of Construction and Repair, Navy Department, Washington, D. C.*
>
> Subject: Contract 53812.
>
> After conference with Bureau Officials and closer reading of schedule 7952 it appears that the paragraph at top of page three of said schedule is not possible of the broad interpretation at first surmised by the writer of this letter and does not contemplate purchase of design rights other than these specifically furnished with the bid of this particular contractor at the opening of May 24th, 1921.
>
> In order to make this clearer I suggest a slight amplification of the paragraph at top of page three of schedule 7952 to indicate that the rights conveyed refer strictly to the design purchased and do not contemplate purchase of patent rights for use on other designs. It is therefore respectfully suggested that the words "relative thereto" be inserted in the paragraph at top of page three after the word "desired."
>
> This change will clear the entire situation and render needless the alteration requested in my letter of June 15th last and the notation made on the returned contracts.
>
> Hoping that my suggestion will meet with approval, I remain,

In accordance with this letter, contract # 53812 was altered by addition of the words "relative thereto" as indicated by italics in the below-quoted paragraph 6 on page 3 of the contract.

> 6. The purchase of a design by the Department will convey to the Government the non-exclusive ownership of that design together with the right to use the same and all information furnished in any manner desired *relative thereto* except that the design will not be accepted and payment will not be made until corrections required by the Department have been made.
>
> A copy of this contract, defendant's exhibit 13, is by reference made a part of this finding.

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18. During 1921 plaintiff published several hundred copies of a pamphlet entitled "How to Steal Valuable Inventions with the Aid of Air Service Officials" in which he made certain references to the proffered license referred to in finding 8. This pamphlet is correctly copied in defendant's Plea in Bar as exhibit "F."

About April 4, 1923, plaintiff filed a declaration at law in case no. 67540, *James V. Martin vs. Manufactures Aircraft Association et al.*, in the Supreme Court of the District of Columbia. In this declaration plaintiff set forth, among other things, the following:

> This plaintiff offered the free use of said valuable basic patents [1,306,768] to the United States Army and the said offer was accepted and a contract executed between the Government and plaintiff, and a voucher for one dollar was signed as a nominal payment to this plaintiff for the use of the valuable patents which he thus donated to the Government, whereupon the defendants herein * * * conspired to deprive the United States Government of the benefit of the free use of the valuable inventions assigned to the Government by plaintiff for the nominal sum of one dollar, as aforesaid, and they caused defendant Fleet to cancel and return to plaintiff the contract and voucher for one dollar executed in the nominal sale by plaintiff of the free use of his valuable patents to the Government, * * *.

In the March 1924 issue of "Libertarian," a magazine sold at newstands in the United States, plaintiff published an article entitled "The Aircraft Conspiracy" in which he made reference to the license offered to the United States as mentioned in finding 8. A portion of this article is correctly copied in defendant's Plea in Bar as exhibit "G."

Prior to the publications above mentioned in this finding, plaintiff on May 5, 1921, after his proffered license had been returned to him, wrote a letter addressed to the Bureau of Information, War Department, which reads in part as follows:

> Can a patent license once accepted, for and in consideration of the sum of one dollar, receipt of which is acknowledged in the license, be returned and nullified by any Officer of the War Department when the

original purchase and acceptance was executed by an authorized agent of the Secretary of War?

In reply the Chief of the Patents Branch of the Ordnance Department advised that the questions "call for a legal opinion which it is not the province of the War Department to render."

19. When the Martin application, which matured into the patent in suit, was filed in the Patent Office, it presented some broad or basic claims, of which the following claims are typical:

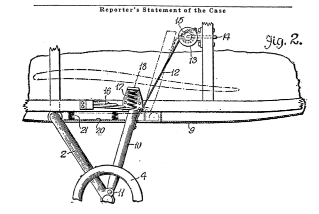
> 1. In an aircraft, a running and alighting device adapted to be readily retracted from one exposed position and housed in an enclosed portion of the aircraft.
> 2. In an aeroplane, a running or alighting device or chassis, and means to retract the device and house the same within portions of the fuselage. * * *
> 4. In an aeroplane, means for reducing the head resistance of the chassis when the machine is in flight.

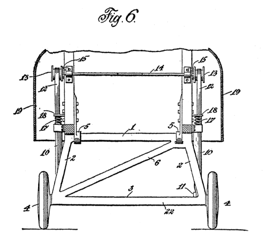
The Patent Office during the prosecution of the application cited 19 prior art patents and showed it to be old in the art and prior to Martin to provide an airplane with a retractable landing chassis folding into the fuselage during flight.

Included in these citations were the British patent to Boultbee #17,921 of 1909, and United States patent to Francis #1,083,394 patented January 6, 1914, which patents are subsequently referred to in detail in findings 24 and 25. A certified copy of the file wrapper of the Martin application, defendant's exhibit D–19, and copies of the 19 patents cited by the Patent Office during the prosecution of the application, defendant's exhibits D–20–2 to D–20–20, inclusive, are by reference made a part of this finding.

20. The patent in suit discloses and relates to a landing gear comprising a frame pivoted on an axis transverse to the longitudinal axis or line of flight of the airplane. Fig. 2 and Fig. 6 of the patent in suit herein illustrate a side view and an end view, respectively, of this construction.

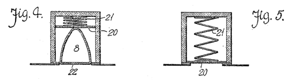
The upper member 1 of the frame is pivoted at points 5, 5 (see Fig. 6) so that the frame is adapted to swing fore and aft of the airplane during its retraction and extension


Fig. 2.
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Fig. 6.
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4
4
22

It is maintained in an extended position by virtue of two pivoted struts 10 extending diagonally rearward and upward to a position where they engage the spring shock absorber 16 and 17 mounted on the fuselage. The landing gear is retracted by releasing the upper ends of the two struts 10 from the leaf spring 16 and then winding up the cable or belt 12 on the ratchet controlled drums 15 mounted on a combined hand shaft 14. When the landing device is extended or lowered, the ratchet controlled drums are released which permit the lowering of the struts 10 until they are clear of and to the rearward of the latch springs 16. They are then manually placed in engagement with the latches.

The disclosure of the patent includes three main characteristics which are made the basis of the claims in suit. The first characteristic relates to the details of the housing of the landing-gear frame when the landing gear is retracted.



The landing-gear frame members are substantially triangular in cross-section so arranged that the lower or forward surface of the frame is substantially flat. When the frame is retracted the same folds in and fits within slots or recesses located in the lower portion of the fuselage so that the flat surface of the frame conforms therewith and forms a substantially continuous surface. Such a substantially continuous surface is formed and closure takes place automatically upon retraction of the landing gear. Such automaticity relieves the pilot from the necessity of separately operating a door or closure device. Fig. 4 of the patent in suit, above, is illustrative of one of the frame members in a retracted position in such a slot and as stated in claim 11, as an example, the frame is formed "to close said opening when in a retracted position and form with said sheathing a substan-

tially continuous outer fuselage surface." By thus closing as far as possible the slots in the bottom of the fuselage, a substantially unbroken surface is presented to the air flow when the airplane is in flight, thereby giving a minimum resistance.

By reference to Fig. 6, added to the application October 3, 1917, it will be noted that only the upper portions of the landing wheels are housed when the gear is retracted. In the other figures of the patent the wheels are not retracted within any portion of the fuselage construction, but merely lie adjacent thereto.

The second characteristic relates to the closing of the receiving slots in the fuselage when the landing gear is in an extended position. This is also accomplished automatically, as will be seen by reference to Fig. 5 above, by means of a closure plate 20 which is normally outwardly urged by springs 21. When the frame is swung outwardly these plates are moved from their recessed position shown in Fig. 4 to the extended position shown in Fig. 5, and as stated in claim 19 provide "means for automatically closing said opening operable simultaneously with the projection * * * of said chassis."

The third characteristic of the patent relates to the form of the swinging frame as illustrated in Fig. 6. This frame is substantially quadrilateral in character, but having a single diagonal strut 6 adapted to receive both concussion and tensile stresses. Claim 5 relates to this feature and reads as follows:

> 5. In an aeroplane, a chassis, a swinging frame, an axle rigid therewith, a journal member forming a pivot connection with the chassis, a single diagonal for tensile and concussion shearing stress of the chassis frame and shock absorbing means supporting the main portion of the aeroplane on the chassis frame.

The purpose and function of the "swinging frame" is to retract the landing gear. The patent discloses and describes only a retractable landing gear applied to a fuselage or nacelle having a flat bottom. It does not disclose the type of airplane or the aerodynamic controls therefor.

21. Claims of the patent in suit, alleged to be infringed, are as follows:

1. In an aeroplane, the combination of a chassis housing having an opening, a chassis adapted to be moved into the housing through said opening, means for moving the chassis, and a closure for the opening lying wholly within the housing.

2. In an aeroplane, the combination of a chassis housing having an opening, a chassis adapted to be moved into the housing through said opening, means for moving the chassis, and a closure housed by the housing with the outer surface of the closure lying inwardly of the plane of the outer surface of the housing.

3. In an aeroplane, the combination of a chassis and a housing for the chassis having an opening to receive the chassis, said opening being closed by the housing of the chassis within said housing.

4. In an aeroplane, means for reducing the head resistance of the chassis when the machine is in flight comprising means for housing the chassis when retracted, means for retracting the chassis and means for closing the apertures in which said chassis is housed when the chassis is in extended position.

5. In an aeroplane, a chassis, a swinging frame, an axle rigid therewith, a journal member forming a pivot connection with the chassis, a single diagonal for tensile and concussion shearing stress of the chassis frame and shock absorbing means supporting the main portion of the aeroplane on the chassis frame.

6. In an aeroplane, a recessed housing, a chassis, means for moving the chassis into the housing while the machine is in the air, and means for covering the recesses when the chassis is withdrawn therefrom. * * *

10. In an aeroplane having a fuselage framework comprising longerons and struts, a sheathing spaced from the fuselage framework, a retractable chassis adapted to be housed within the space between said framework and sheathing, and automatically operating means for closing said space.

11. In an aeroplane, a retractable chassis, and a fuselage having a sheathing provided with an opening into which the chassis is adapted to be retracted, said chassis being formed to close said opening when in retracted position and form with said sheathing a substantially continuous outer fuselage surface.

12. In an aeroplane, a retractable chassis frame, and a fuselage having sheathing formed with openings to receive the several members of the said frame, said frame members being adapted to fit within and close said opening when the chassis frame is in retracted position.

13. In an aeroplane, a retractable chassis having frame members and a fuselage having a sheathing provided with openings into which the several frame members are adapted to fit in retracted position of the chassis, said frame members having sides to close said openings and form with said sheathing a substantially flush continuous outer surface.

14. In an aeroplane, a retractable chassis having a swinging frame and wheels thereon, a fuselage having an outer sheathing formed with a pocket at each side to receive the wheels and slots corresponding in width to the width of the members of the frame, whereby said chassis frame may be swung into said slots to be housed by said sheathing and to close the slots.

15. In an aeroplane, a fuselage having a sheathing, a chassis frame pivotally attached to the fuselage above the plane of the lower side of the sheathing, said sheathing being formed with openings to receive the frame, and means for swinging said chassis frame upon its pivots through said openings with the lower surface of the frame substantially in the plane of the sheathing to close the openings and form a continuation of the sheathing surface. * * *

17. In an aeroplane, a retractable chassis, a fuselage having a sheathing open to receive said chassis, and means for closing said sheathing operated by a movement of said chassis.

18. In an aeroplane, a retractable chassis, a fuselage sheathing formed to receive said chassis, and automatically opearting means for closing said sheathing.

19. In an aeroplane, a fuselage having an external sheathing provided with an opening, a chassis retractable through said opening, and means for automatically closing said opening operable simultaneously with the projection and retraction of said chassis.

22. An aeroplane known as the "Martin Kitten III" was constructed by or under the supervision of plaintiff and was successfully flown in 1919. During this flight the landing gear remained at all times in an extended position. This aeroplane is now on exhibition in the National Museum, Washington, D. C.

Reporter's Statement of the Case

The aeroplane has a retractable chassis or landing gear which embodies the characteristic of the patent in suit relating to the form of the frame members and their retraction into the lower part of the fuselage in such a manner that a substantially continuous fuselage surface is formed when the landing gear is retracted, the shape of the frame members being such that this function is automatically dependent upon retraction. This structure, however, does not include the housing members illustrated in the cross-hatch section, nor the closure member 20 with its automatically operated spring 21, as illustrated in Figs. 4 and 5 of the patent.

23. Included among the patents cited by the Patent Office and considered by the Examiner during the prosecution of the Martin application, which matured into the patent in suit, were the following:

British patent to Boultbee, #17,291 of 1909 (Deft.'s Ex. D-20-3).

United States patent to Francis et al., #1,083,394, patented January 6, 1914 (Deft.'s Ex. D-20-12).

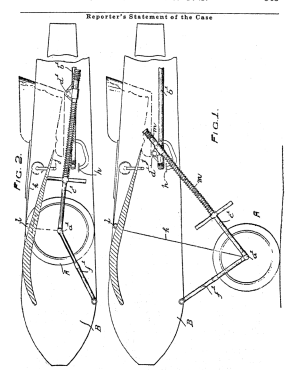
U. S. patent to DeBert Hartley, #1,131,779, March 16, 1915, on application filed June 13, 1913 (Deft.'s Ex. 20-17).

United States patent to Smith, #1,166,488, patented January 4, 1916, on an application filed December 27, 1912 (Deft.'s Ex. D-20-18).

24. British patent to Boultbee is illustrative of the art relating to retractable landing gears, in that it discloses, as shown in the appended illustrations, Figs. 1 and 2 of the patent, a retractable landing gear capable of being raised to such a position that it is entirely inclosed and inside of the fuselage of the machine.

The wheel or wheels are carried at the lower end of the frame hinged on a transverse axle and the frame swings longitudinally upwardly to a position within the fuselage. The wheels are held in the landing position by means of shock-absorbing struts having one end attached to the axle and the other to a slider-block. The landing gear is raised and lowered by means of a cable connected to a handle-operated drum located in the pilot's cockpit.

25. United States patent #1,083,394 to E. D. and J. D. Francis of January 6, 1914, discloses an aeroplane having



three landing wheels, two in the front and one in the rear, which may be retracted within the body or fuselage of the aeroplane during flight and which are projected below the fuselage for landing. The specification states that this is to reduce the resistance of the air to the greatest possible extent.

Figs. 2 and 3 of the Francis patent, which figures are illustrative of the retractable landing gears and wheels, are set forth below.

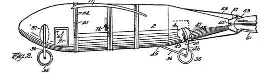


Fig. 2 is a side elevation partly broken away, with the wheels in ground running position. Fig. 3 is a sectional detail of a portion of the body showing one of the wheels in telescoped position within the fuselage or body of the aeroplane.

The specification with reference to the landing and running gears states as follows:

> It is desirable in aerial vessels to reduce the resistance to the air to the greatest possible extent. To that end it is one of the objects of our invention to provide disappearing ground wheels as 35. These wheels are connected to suitable bearing arms or brackets 36; the forward wheels being arranged on opposite sides of the center of the vessel and movable up into receiving pockets 37. The arms 36 of the front wheels extend upwardly and each is surrounded by a floating collar 38 resting upon reacting springs 39. The upward arms 36 of the front wheels are also adapted to slide through the collar 38 and the upper portions of the rods 39 are recessed, as at 40; these recesses being adapted, when the arm is lowered to project the wheels 35, to engage with spring locks or detents 41 in the collars 38, so that the load of the vessel is then transmitted to the wheels through means of the spring-supported collars 38. * * * The rear supporting wheel 35, which may be mounted centrally of the vessel, is connected by a swiveling arm 36, pivoted at 45 to the bottom of the vessel; the end of the arm 36 being provided with a suitable bearing or yoke 46 which may be drawn up into a pocket or chamber 47 in the body by means of a haul cable or connection 48. The wheel is normally sustained in its lowermost position by an expansible spring 49, mounted in the pocket 47 and engageable with a pawl or latch 50 in the upper end of the yoke 46; the latch being connected to the cable 48, so that when the wheel is to be elevated, a pull on the cable 48 disconnects the latch 50 from engagement with the expansible spring 49 and

thereby permits the wheel to be drawn inboard. * * * When the ground wheels have been telescoped in the body the apertures of the chambers may be closed by doors 37′ and then the vessel can safely alight on water.

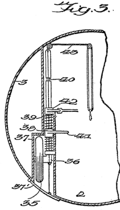


Fig. 3 shown above is a partial transverse section through the aeroplane forward of the front retracting landing gear and illustrates a cord or cable fastened to bearing arm or bracket 36 of the landing gear and intended automatically to close the doors or coverings 37′ in the fuselage when the landing gears are raised to a retracted position within the body of the aeroplane. While in Fig. 3 the bearing arm 36 and the connecting cable for closing the opening in the fuselage are on one side of the plane of rotation of the wheel and the hinge of the door is attached to the fuselage on the opposite side, the quoted specification has reference to closing all the apertures in the fuselage by means of the doors 37′ and the language of the specification clearly discloses to a man skilled in the art a closure for the fuselage opening which is operative automatically upon the extension or retraction of the landing gears.

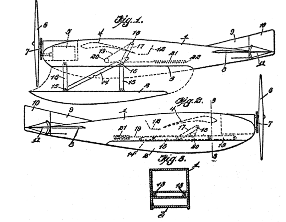
Reference to Fig. 2 discloses that the element 36 is a swiveling arm extending forward from a pivot 45 located at the bottom of the fuselage at a point forward of the axle of the rear landing wheel a greater distance than the radius of the wheel. This construction, to which the specification also refers, permits the operative location of the cable connecting the element 36 with the door 37′ at a point ahead of the tire of the wheel at which point the cable will automatically close and open the door 37′ with retraction and extension of landing gear without any fouling engagement between the wheel and cable.

With reference to drawing Fig. 3, it would also be within the skill of an ordinary mechanic to (1) hinge the door 37′ on the same side of the plane of rotation of the front wheels as the operating cable; (2) place the front wheels on the inside of bearing arm 36, as such wheels are shown in drawing Fig. 2.

While this Francis patent shows the automatic closure for the pockets into which the landing gears are retracted as overlapping the edges of the pockets, it would be within the skill of an ordinary mechanic to hinge the door on the inside of the fuselage sheathing so that the door 37′ would lie wholly within the pocket and flush with the outer surface of the sheathing, thereby providing a perfectly smooth fuselage surface when the landing gears are in a retracted position.

26. U. S. Patent to Rexford M. Smith, #1,166,488, relates to aircraft and especially aeroplanes, the object of the invention being to provide a body or nacelle of novel construction having a general streamline form, the nacelle employing two relatively movable portions, one of which is adapted to form a supporting base for the other section, the main body section of the nacelle being designed to have mounted thereon or connected therewith the usual supporting, controlling, and power devices, by means of which the machine as a whole is controlled while traveling along a supporting surface or while in actual flight in the air (Patent, p. 1, lines 9–23). In the preferred form of the invention illustrated in this patent, Figs. 1, 2, and 3 of which are reproduced herein, there is illustrated a seaplane or flying

boat in which the landing pontoons or floats may be retracted within the streamline form of the fuselage and against the lower portion thereof. As stated in the patent, the leading feature of the invention resides in providing a nacelle which is composed of the machine body and a supporting base, these parts being so divided and combined that when brought together they will form a streamline body or nacelle which may be propelled through the air with a minimum amount of head resistance. When the machine is in flight no head resistance will be caused by



the supporting base upon which the machine rests, while not in flight. Since the supporting base as a whole is included within the confines or outer contour of the nacelle, the two sections of the nacelle form complemental portions of each other (Patent, p. 2, lines 78–95). The use of the nacelle is not restricted to any particular type of machine, as it is equally applicable to monoplanes, biplanes, and multiplanes, whether of the heavier-than-air-type or the lighter-than-air-type, or a combination of the two (Patent, p. 2, lines 105–111). The patent also states that the invention de-

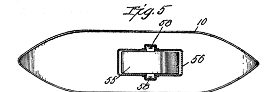
scribed therein may be used in connection with hydroplanes, motor sleds, and other water and land craft (Patent, p. 2, lines 111 to 114). This patent discloses a floating undercarriage or chassis folding into recesses in the bottom of the fuselage and cooperating with those recesses to reduce the air resistance. This feature of the invention is set forth in claims 2 and 3 of the Smith patent, which are as follows:

> 2. In air craft of the character specified, a closed nacelle having a supporting undercarriage, and means for adjusting said undercarriage upwardly against the bottom and within the stream line thereof.
>
> 3. In craft of the character specified, a closed nacelle embodying an undercarriage comprising fore and aft members adapted to be moved into such relation to the nacelle as to form in connection therewith a stream line body.

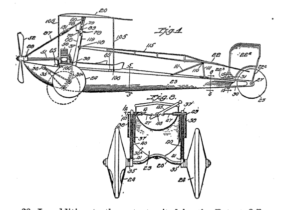
The chassis frame members 13 fold within a pocket in the under side of the fuselage proper and the undercarriage or supporting base 2 automatically closes the pocket when retracted, forming with the fuselage a continuous unbroken surface.

This Smith patent does not disclose a landing gear frame folding into slots or recesses in the bottom of the fuselage and cooperating with the slots to reduce air resistance, nor does it disclose a structure adapted for landing other than on the surface of the water.

27. U. S. patent to Hartley, #1,123,737, discloses an amphibian aeroplane having a landing wheel retractable into a recess in the underside of the fuselage or body. This pocket is lined with casing 56 which conforms to the shape of the wheel and the operating mechanism therefor as illustrated in Fig. 5, reproduced herewith.



The boat body of the aeroplane is recessed at 36–a as shown in Figs. 1 and 8, reproduced herewith, to receive the axle 26 when the wheels are raised (Patent p. 2, lines 119, et seq.). Within this recess is positioned the retracting mechanism for the landing gear.



28. In addition to the patents cited by the Patent Office and considered by the Examiner during the prosecution of the Martin application which matured into the patent in suit (copies of which are by reference made a part of finding 19), reference is made to the following prior patents and publications:

Foreign Patents

French patent to Penaud & Gauchot, #111,574, issued February 18, 1876 (deft.'s exhibit 26; with translation deft.'s exhibit 24–7);

French patent to Monin & Foucault, #419,663, issued November 2, 1910 (deft.'s exhibit 24–10 with translation);

French patent to Gagneux, #436,649, issued January 29, 1912 (deft.'s exhibit 24–13 with translation);

French patent to Lawrence, #474,585, issued December 12, 1914 (deft.'s exhibit 24–18 with translation);

German patent to Kress, #8,706, issued in 1879 (deft.'s exhibit 24–19 with translation);

German patent to E. Rumpler-Luftfahrzeugbau, #256,-610, issued February 17, 1913 (deft.'s exhibit 24–20 with translation).

French 448,585 issued November 30, 1912, to Desvignes and Denhaut (Defendant's Exhibit D–24–17, with translation).

French patent of Addition #16,776, issued February 6, 1913, to Donnet & Leveque (Defendant's Exhibit D–24–15, with translation).

United States Patents

United States patent to C. J. Lake, #918,336, issued April 13, 1909 (deft.'s exhibit 23–3);

United States patent to F. McCarroll, #1,097,816, issued May 26, 1914 (deft.'s exhibit 23–11);

United States patent to F. McCarroll, #1,152,743, issued November 3, 1911 (deft.'s exhibit 23–15).

United States Patent to E. F. Gallaudet #1,214,536 issued February 6, 1917, on an application filed April 25, 1913 (Defendant's Exhibit D–23–17).

Publications

Pages 274–289, L'Aeronaute, issue of October 1877, with translations (deft.'s exhibits 25–33; 26 with translation; and 24–7);

Pages 146 and 147, Aeronautics (London), issue of May 1914 (deft.'s exhibit 25–13);

Pages 293–295 inclusive, L'Aerophile, issue of July 1, 1913 (Defendant's Exhibit D–25–35, with translation).

Aeronautics (New York—issue Feb. 28, 1914, page 51, defendant's Exhibit 25–9).

Pages 152 and 153, Aeronautics (New York), issue of May 30, 1914 (deft.'s exhibit 25–11);

Page 51, Aeronautics (New York), issue of February 28, 1914 (deft.'s exhibit 25–9);

Page 226, The Aero (London), issue of November 1911 (deft.'s exhibit 25–3);

Page 13, Aeronautics (London), issue of January 1914 (deft.'s exhibit 25-12).

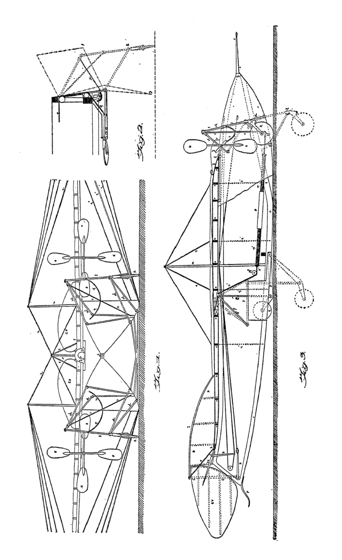
The exhibits referred to herein are by reference made a part of this finding.

29. French patent to Penaud & Gauchot #111,574, was granted February 18, 1876. The papers filed with the French Government included a specification written out in longhand accompanied by a set of drawings. The entire specification and a portion of the drawings of the Penaud & Gauchot patent were published in the October 1877 issue of "L'Aeronaute," a French periodical publication. This was many years before the problem of flying and landing an aeroplane passed from the realm of mere speculation and became even an experimental fact.

The specification indicates that the invention relates to an aerial flying apparatus and belongs in the category of aeroplanes having inclined planes acting upon the air like kites and propelled by aerial propellers. The fuselage or body of the aeroplane is described as being capable of landing either on water or land. In connection with the landing mechanism for use on land, the specification refers to what is termed as "elastic legs with rollers." The specification states with reference to the front legs, which are termed parallelogram legs, as follows:

"The front legs can be housed in the general shapes of the nacelle by a mechanism clearly developed in our drawings and by a movement like that of a man, who having at first his hands placed as if to strongly push a door in front of him, should then cross them upon his chest. Impressions in the surface of the nacelle receive the different pieces of these legs."

Figs. 1 and 2, which are reproductions from sheets 3 and 4 of the original drawings of the Penaud & Gauchot patent #111,574, are illustrative of the disclosure of the front legs as contained therein. Fig. 3, which is taken from sheet 1, shows the arrangement of both the front and the rear legs and is illustrative of the recesses into which the rear legs and wheels fold. The drawing marked Fig. 3-1 set forth below is a cross section of Fig. 3 showing one of the rear landing gears.



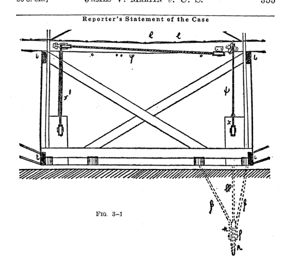


FIG. 3-1

With respect to the folding or retraction action, the specification states as follows:

> The housing of the four legs is effected by the action of ropes, or chains, passing over pulleys. This action can be assisted by the weight of the legs and by small special springs, the same as the projection movement. For the simultaneous and rapid projection of the four legs, it is sufficient to release a latch; the drawings clearly show the working of this whole mechanism. The housing is effected by opposite movements. The position of projection in order to receive the shock can be varied at will by gearings or suitable brakes. The springs of the legs are under constant initial tension; the rubber wires placed in a tube represented in our drawings have this initial tension, which is not indispensable. This tube is displaced longitudinally in the movements of projection and housing, inasmuch as it forms with the ropes which connect it to the legs a transmission which connects these movements. A bolt engages the tube when the legs reach their position of projection in order to be ready for the shock.

> We reserve making the front legs like the rear legs, but preserving always the free orientation of the wheels. Conversely, the rear legs can be like the front legs, with or without orientation of the wheels.
>
> The holes that the four legs form in the walls, and especially in the base of the nacelle, can be closed by valves, after the housing, so as not to give passage to water when the aeroplane rests upon the water. The same result is obtained by surrounding the place of housing of the legs with coverings and suitable troughs; our drawings show arrangements of this class. The legs will be covered with waterproof coatings and rust preventatives.

There is no suggestion given as to how the valves should be constructed.

This patent discloses to a man skilled in the art the use of openings in the fuselage which openings are covered with suitable linings such as troughs or channels on the interior thereof, and which housings are automatically closed, at least, partially when the landing gear is retracted therein. This patent discloses to a man skilled in the art the formation of housings, the openings of which substantially conform with the shape of the struts of the landing gear.

30. The French patent to Monin & Foucault, #419,663, discloses several types of landing gear, all of which are mounted upon frames pivoted on transverse axes above the lower surface of the fuselage and retractable to a position entirely within the fuselage during flight.

This patent describes the several types of landing gears, beginning at page 4, line 76, and ending on page 5, line 85, in which is contained the following statement at page 2, beginning with line 82. "Figures 15, 16, 17, and 18 represent different arrangements of wheels and of suspension springs which can be retracted within the interior of the nacelle once the airplane is in the air. ll′ is the bottom of the nacelle, representing the necessary openings for passage of the wheels and the suspension rods. The wheels are mounted on rods oscillating about axis m; r are the suspension springs guided by rods q and butted by the rotating stops n, about which is effected rotation of the rods q; t are the retracting wires, u the guide pulleys for the wires, v the

coupling gear or analogous jaws insuring the positive engagement of the wheels with the suspension springs; w are the stops limiting the throw of the wheel. The arrows denote the direction of the forward movement of the airplane." The form or shape of the landing gear struts is not described and there is no disclosure of the shape or contour of the opening through which the landing gear is retracted.

Fig. 16 of the patent discloses a triangular frame for the landing gear in which a diagonal strut member takes both compression and tension strains during landing. This strut, however, is located in a plane parallel to the axis of motion of the plane while landing, and does not have the same crosswise bracing function as the single crosswise diagonal strut mounted on the swinging retractable frame of the Martin patent, in which the swinging frame is mounted in a plane transverse to the line of motion of the aeroplane. However, German patent 286,876 to "Kondor" Airplane Works at Essen on the Ruhr, granted June 1, 1913, and published September 9, 1915 (Defendant's exhibit D-24-22), shows in Fig. 2 a diagonal strut member, which takes both compression and tension strains during landing, located in a plane transverse to the axis of motion of the airplane while landing, and has the same crosswise bracing function as the crosswise diagonal of the patent in suit.

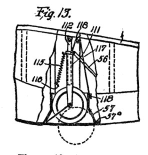
31. The French patent to Gagneux, #436,649, discloses an aeroplane having a retractable landing gear, the specification stating that—"* * * permits utilization of these wheels for landing; and by means of the said suspension, therefore, the said shock absorbers are of such construction that, if desired, on the one hand, during flight, and for diminishing the resistance to forward travel, raises the said wheels and obliterates them into the interior of the fuselage, and, on the other hand, lowers the said wheels, when it is desired, to their active position."

The specification further refers to raising the wheels, which are on telescoping tubes, and turning them into the fuselage and into indentations provided for in this position in the plating of the fuselage. The specification further describes a system of grooves and lugs in connection with

the walls of the tube "* * * with the object that the said wheels go automatically, in arriving at their upper position to their places in their indentations y."

The shape of the indentations, as shown in Figs. 1 and 3, does not conform to the chassis frame work and there is no relative configuration of the indentations to the landing gear such as will produce a substantially flush or continuous outer fuselage surface when the wheels are retracted. There is no reference to any closure for the indentations.

32. The French patent to Lawrence, #474,585, issued December 12, 1914, discloses an aeroplane having retractable landing gear in which the landing wheels and their supporting struts are retracted vertically into a well or chute in the interior of the fuselage through an opening within the bot-



tom covering. The specification states that the bottom of the chute and pocket into which the wheels are retracted, can be closed by a trap door when the wheel is raised.

This patent discloses the means or mechanism by which this door is mounted in place, in that the door for each landing wheel is shown in Fig. 13 of the patent appended herewith as hinged on the inside of the fuselage sheathing as indicated at designation 57a at the rear of each wheel.

When the landing gear is in a retracted position and this door is closed it forms, with the sheathing, a continuous outer fuselage surface. While the specification does not describe how this door is operated for opening or closing, it

would be within the skill of an ordinary mechanic to provide means for automatically opening or closing this door.

The patent does not disclose a landing gear frame folding into slots or recesses in the bottom of the fuselage in such a manner that conformity exists between the frame and receiving slots so as to form a substantially continuous outer fuselage surface.

33. The German patent to Kress, #8,706, was issued in 1879. The early date is indicative of the speculative nature of the disclosure.

The patent, as indicated by the claim, relates to "A steerable flying apparatus which is moved either on water or on land depending upon whether the fuselage is a boat, sleigh, or wagon. * * *"

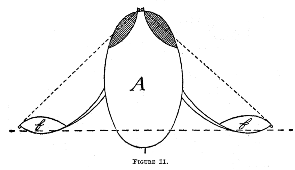


FIGURE 11.

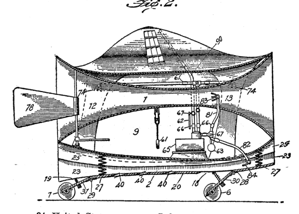
The only reference to the retraction of any mechanism relates to stabilizing floats and is contained in the following statement:

> The stabilizing float f located on the boat *A*, Fig. 11, 12, and 13, consists of elongated hollow parts which are fastened on movable cranks so that they can be drawn into the upper part of the boat as soon as the boat starts to move away from either the water level or the earth, and which are invisible during flight.

This patent contains a suggestion that auxiliary floats or pontoons may be so shaped that when they are folded against

indentations in the main hull they will merge with it to form a substantially continuous outer surface. The patent is silent regarding the construction or form of the chassis upon which the floats are carried and its location when the floats are in a folded position. This patent does not disclose a folding chassis or frame work folding into slots or recesses in the bottom of the fuselage and cooperation with the slots to reduce air resistance, nor does it disclose any detail of a structure adapted for landing other than on the surface of the water.

Fig. 2.



34. United States patent to Lake, #918,336, discloses a vessel for aerial navigation in which the propulsion and lifting effect are to be obtained from jets of steam or other heated elastic fluid, these jets being discharged in a plurality of conduits running fore and aft of the vessel. The lower or bottom conduit has a flexible or telescoping bottom supported on springs with reference to the main structure. Mounted on the lower side of the lower conduit are two cover plates or aprons; these aprons, which extend the full

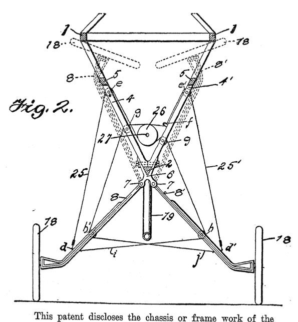
width of the conduit, carry at their extremities, landing wheels. When these aprons are opened by means of worm gearing to the position shown in Fig. 2 of the patent, which is shown above, the wheels are in a position for landing and at the same time openings are provided in the lower propulsion conduit.

The aprons may be retracted by means of worm gearing to lie flush with the remainder of the lower surface of the conduit and to close the openings therein when in this latter position. The lower surface of the conduit is not a part of the main structure or fuselage, but is separate and distinct therefrom, being connected to the main part of the machine by spiral springs.

As shown in Figs. 2 and 6 of the Lake patent, the sheathing 20 of the structure is provided with an opening, the edges of which are beveled to correspond with the beveled edges of the apron. When in retracted position the apron 30 lies within the recess 18 therefor, and forms with the sheathing 20 a substantially continuous outer surface. The wheels lie adjacent the exterior of the vessel similar to the wheels illustrated in Figs. 1 to 5 of the Martin patent.

Any attempt to use a large area or flat plate, such as exists in the folding aprons of this patent, would cause serious difficulty in stability due to the added wind resistance introduced when the aprons are open. The disclosure of this patent, so far as its aerodynamic features are concerned, is properly classified as a freak.

35. United States patent to McCarroll, #1,097,816, discloses a running gear for aeroplanes, which is retractable and is so constructed as to fold up in a transverse plane against the sides of the fuselage with the wheels partially entering pockets or openings therein. Fig. 2 of this patent, which is appended herewith, shows the running gear in an extended position in full lines, and in folding position in dotted lines. The specification states, with reference to this feature, as follows: "* * * Ordinarily, the fuselage is suitably covered, as indicated at *a*, with the exception of the necessary pockets or openings for the entrance of the wheels of the running gear, as will hereinafter appear. * * *"



This patent discloses the chassis or frame work of the landing gear folding against the surface of the fuselage and does not disclose the chassis entering into or lying within recesses or openings formed in the housing of the fuselage.

36. In the issue of "Aeronautics" of May 1914, there is an article illustrating and describing an aeroplane referred to as the Blanchard Monoplane. A retractable landing gear is referred to in the article as follows:

> The landing chassis is simply composed of two wheels and a skid. The wheels are mounted on V-shaped members and suspended on twin coil-springs, lying parallel with the body of the machine. After leaving the ground the wheels are folded upward and inward, disappearing through apertures in the body of the machine which are closed by sliding doors. The folding of the wheels is accomplished by worm-gear operated by the feet of the aviator.

Reporter's Statement of the Case

One illustration indicates the outline of a door or panel directly above the left side wheel. There are no further directions or instructions given to enable a man skilled in the art to construct the landing gear. The article is silent as to how the sliding doors are constructed, in which direction they slide, and by which means or mechanism the sliding doors are operated.

37. In the issue of "Aeronautics" of May 30, 1914, an aeroplane referred to as the Boland Flying Boat is described.

The description makes reference to the fact that when the wheels are retracted they are "* * * raised into a light wheel box of a streamline form above the water line."

The shape of the box for housing, beyond its being of streamline form, is not disclosed; how far the wheels enter the box is not described, nor is there any disclosure made of the form or shape for the opening in the box. The wheels when raised into streamline position would function as a partial closure therefor.

38. In the November 1911 issue of the publication "Aero," there is described and illustrated an aeroplane having a landing gear in which the wheels are carried by two inverted tripod frame works fastened to the aircraft at their upper ends, each supporting a wheel at the lower end. This publication discloses a landing gear having a single diagonal strut adapted to receive both tensile and concussion shearing stresses.

In the construction shown in this publication, the landing wheels, instead of being mounted rigidly upon the frame work, are carried in a skid frame which has a rocking and swivelling with respect to the frame members.

This publication does not disclose a retractable landing gear having a swinging frame, the function of which is to swing to a retracted position, nor does it disclose a journal-member forming a pivot-connection with an axle rigid with the frame construction for the mounting of the wheel.

39. In the January 1914 issue of the publication "Aeronautics," there is disclosed an illustration of the Nieubort-Dunne aeroplane landing gear.

This landing gear is also of the inverted tripod type having its base on the underside of the plane fuselage and converging at a pivot point; a skid is pivotally mounted and connected to the aeroplane fuselage by a shock absorber at its forward end and carries at its rearward trailing end a landing wheel.

This publication does not disclose a retractable landing gear having a swinging-frame or a journal-member forming a pivoting connection with the chassis, and further, it does not disclose the wheel axle as being rigid with a swinging-frame.

40. The aeroplane structures manufactured for or by the United States, and charged by plaintiff to infringing the patent in suit, have been stipulated to be the Dayton-Wright Alert; Verville-Sperry; Bee-Line Racer; Loening-Amphibian, and PW-8.

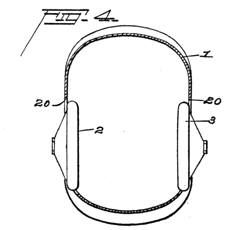
Dayton-Wright Alert Aeroplane

41. A contract was entered into by the United States with the Dayton-Wright Company on June 29, 1921, for the construction by them of three of these aeroplanes, the first of which was delivered November 13, 1922. The second of these planes was delivered June 29, 1923. The third and last plane of the contract was delivered on July 19, 1923. The second and third planes did not meet the requirements under the contract and were rejected March 12, 1924.

The retractable landing gear of this plane, as constructed, comprised a plurality of struts hinged on each side of the lower portion of the fuselage, each set of struts supporting at their outer converging ends a shock-absorber mounting, which shock-absorber mounting in turn supports a landing wheel, the landing wheel, therefore, forming a non-rigid connection with the supporting chassis or frame work.

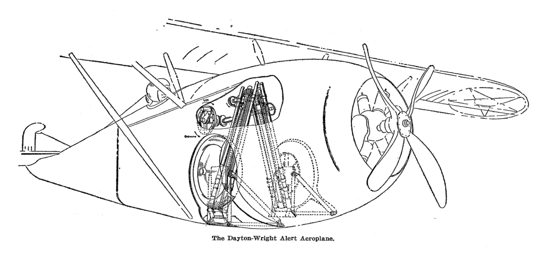
The fuselage is provided on each side with a circular opening, which opening closely conforms to the periphery of the wheel when the same is in a folded position, sufficient clearance, however, being left to permit free entrance and

exit of the wheel. Other openings in the fuselage covering or housing are provided to receive the struts or frame work of the landing gear when the same is retracted. These openings are not in the nature of pockets or grooves in which the landing gear lies, but are merely openings, the function of which is to permit the struts to enter and pass entirely into the interior of the fuselage when the landing gear is retracted.



The wheels are provided with disks so that when the same are in a retracted position in the openings, the wheel tire and associated wheel disk operate automatically to substantially close the fuselage opening, as shown in Fig. 4, above, and the appended illustration of the Dayton-Wright Alert, discloses this structure in a retracted position.

All of the uses by the Government of the Dayton-Wright Alert aeroplanes were entirely experimental.

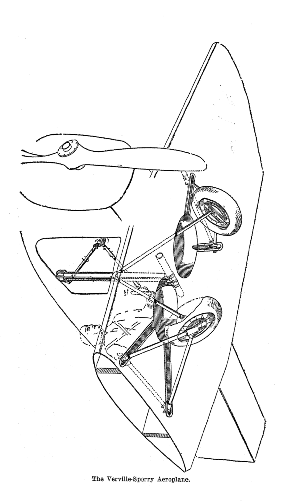


The Dayton-Wright Alert Aeroplane.

Verville-Sperry Aeroplane

42. On May 23, 1922, a contract was placed with the Lawrence Sperry Aeroplane Company for three aeroplanes; these were delivered to the Army Air Service and were accepted on October 10, 1922. The Verville-Sperry Aeroplane was of the monoplane type with the bottom fuselage merging into the lower wing surface and providing a single continuous surface extending the entire width of the aeroplane. The landing wheels, of which there were two, were each mounted upon a separate chassis folding inwardly and upwardly upon hinged members having swinging axes parallel to the longitudinal axis of the aeroplane. When first built by the contractor, openings were provided in the lower fuselage surface of conforming shape to receive the chassis or frame members of the landing gear. Rubber sheeting was applied across these openings so that when the chassis was either in an extended or retracted position the rubber sheeting would form a closure for the apertures in the fuselage to prevent the entrance of air in the wings.

After the aeroplanes had been received by the Government, and before they were used, the rubber sheets were removed and the openings in the lower surface of the fuselage were lined with thin metal so that channels or grooves were formed. As seen by the appended illustration herewith, which shows the landing gear in a partially retracted position, these channels or grooves are so constructed as to closely conform to the landing gear struts when in a folded position. These struts which are of rounded form, lie, when in a retracted position, entirely within the grooves or channels. The wheels of the landing gear, however, were not provided with any fairing discs but were left with open spokes. The landing gear when in retracted position did not lie parallel with the exterior surface of the fuselage but at an angle thereto. A strictly flush closure of the grooves is, therefore, not present in this structure. However, the air resistance occasioned by the channel openings is reduced by the presence of the strut members when the same are received therein. The only closure for the grooves is a partial closure caused



The Verville-Sperry Aeroplane.

by the presence of the rounded struts lying within the grooves.

One of these planes participated in the Pulitzer races in October 1923, but, due to mechanical difficulties, it did not finish. Just prior to these races fairings were attached to the landing gear struts, which fairings were so shaped as to completely fill the channels or grooves which received these landing-gear frame members so that when the landing gear was retracted a continuous flush under fuselage surface was obtained insofar as the chassis frame members are concerned. Aprons or disk-shaped members were also mounted on the wheel-supporting members at such angles to the wheels that they would lie approximately flush with the under surface of the plane. These fairings and aprons were attached by the pilot on his own initiative and without official authority or direction.

All of the uses to which these planes were put were for experimental exhibitions and demonstration purposes.

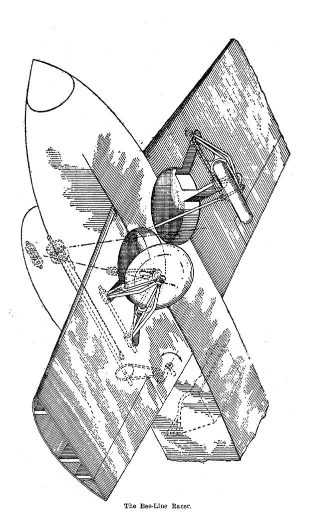
Bee-Line Racer

43. Early in 1922 the Government contracted with the Bee Line Aircraft Corporation for the manufacture of two aeroplanes. These planes were delivered for tests in the latter part of September 1922 and accepted by the Government in the early part of October 1922.

Insofar as the housing of the landing gear in the lower part of the fuselage is concerned, this structure is substantially identical with that of the Verville-Sperry Aeroplane, as will be evident from the appending illustration, which shows the landing gear in a partially retracted position. In the Bee-Line Racer construction, conforming channels or grooves are formed in the lower surface of the wings and fuselage which are adapted to receive the landing gear chassis when in a retracted position. Wheel pockets are also formed in the lower fuselage surface. The landing gear struts are of rounded form and lie substantially within the channels or grooves when in a retracted position. As was the case with the Verville-Sperry type of aeroplane, a flush closure is not present in this structure, but the air resistance

occasioned by the channel openings is reduced by the pressure of the strut members when the same are received therein, and the closure, while therefore imperfect, approaches a substantially flush surface.

It was at first proposed to use wheel fairings on this type of aeroplane to obtain a flush closure for the wheel pockets. Such fairings, however, were not on the plane when delivered to the Government for tests, and have never been applied or employed by the Government.

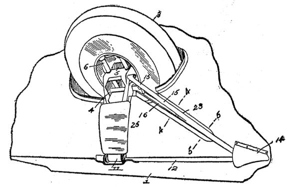


The Bee-Line Racer.

Loening-Amphibian Aeroplane

44. A contract was entered into on November 8, 1923, with the Loening Aeronautical Engineering Corporation of New York, for the construction of a plane known as the Loening-Amphibian Aeroplane. Such plane was accepted by the Government on September 3, 1924, and others have since been ordered.

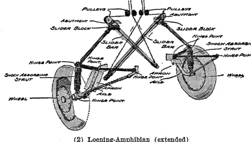
The body of the machine comprises a main hull portion having landing wheels provided on each side thereof. These



(1) Loening-Amphibian Aeroplane (retracted)

wheels are mounted on a retractable chassis comprising a triangular frame hinged to rotate about an axis parallel to the longitudinal axis of the aeroplane so that the wheels are adapted to fold up upwardly and inwardly. The hull is also provided with pockets therethrough in which the operating mechanism for a wheeled landing gear is located. The wheels are mounted upon two frames each retractable into the transverse space through the hull. The hull is also provided with pockets for the wheels of considerably larger dimensions than the wheels. The wheels when in retracted position partially enter the pockets in the upper side of the

hull. There is also provided for each frame a longitudinal strut connected to the chine line of the float and to the wheel. In the side of the hull there is a groove in which a portion of this strut lies when in a retracted position, and, when in such position, this strut provides a partial closure for the groove. The main wheel supporting struts are provided with a flat fairing or plate so shaped as to conform to the surface of the hull when the landing gear is retracted and therefore form an automatic closure for the hull sheathing. This closure plate is shown in a retracted position in the appended illustration (1) of the Loening retractable gear, and, by overlapping the edges of the sheathing, functions



(2) Loening-Amphibian (extended)

to form, with the sheathing or surface of the hull, a substantially continuous outer fuselage surface. The primary purpose for the apron overlapping the transverse openings through the hull is to prevent water entering the hull at the chine line. While the use of the apron or flat fairing reduces the air drag, such reduction is small compared with the total drag produced by the other openings which are only partially closed by the wheels and struts when in a retracted position. The relationship between the groove and the strut is such that the only closure for the groove is a partial closure caused by the presence of a portion of the rounded strut lying within the groove.

The landing gear frame work of this aeroplane includes a single diagonal strut for each wheel, as shown in the ap-

pended illustration, (2), of the Loening-Amphibian Aeroplane, which landing gear, under certain landing conditions, may be subject to both tensile and concussion stresses. This strut member, however, is not for crosswise bracing, but is located approximately in a fore and aft position, and is thus substantially similar in function and location to the single strut disclosed in the French patent to Monin and Foucault (see finding 30).

PW-8 Aeroplane

45. A contract was entered into on April 27, 1923, with the Curtis Aeroplane & Motor Corporation of New York, for the construction of the first plane of this type and it was accepted at Mitchell Field, New York, on May 11, 1923.

The landing gear of this type of aeroplane is of the non-retractable or fixed type, as shown in the appended illustration.

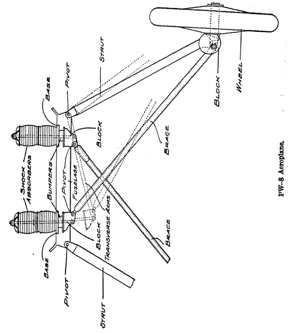
It comprises a strut structure which is pivoted to the base of the aeroplane for motion in a plane transverse to the longitudinal axis of the plane. The purpose of this pivoting is to permit a restricted lateral and vertical movement of the cross braces which are connected at their upper ends to the shock absorbers. This landing gear possesses a single diagonal strut which is adapted to receive both tensile and concussion shearing stress.

There is not present in this structure any "swinging frame" having the same function or effect as that of the patent in suit, i. e., to permit the frame to be swung about an axis for the purpose of retracting the same.

46. The first characteristic of the patent in suit relates to a retractable landing gear frame having a flat surface, which flat surface cooperates with the fuselage sheathing at the sides of slots or grooves therein to produce, with respect to the landing gear frame only, a substantially continuous outer fuselage surface when the landing gear is in a retracted position. This feature does not represent invention over what was known and shown in prior patents.

If this feature should be held to constitute invention, this characteristic, as expressed by the terminology of claims 3, 10, 11, 13, 14, 17, and 18, is found to be applicable to the

Loening Amphibian aeroplanes in which an apron or cover plate attached to the main wheel supporting struts of the landing gear frame functions automatically to close this fuselage slot when the frame is retracted. On like condition



PW-8 Aeroplane.

of invention the terminology of these enumerated claims applied to the Verville-Sperry Aeroplane when it was operated with fairings attached to the landing-gear frame members.

Reporter's Statement of the Case

47. The terminology of this same group of claims is approached in the structure of the Verville-Sperry plane without the fairings, and the Bee-Line Racer plane, where the structures do not comprise a continuous outer fuselage surface or flush closure, but in which rounded members of the chassis frame when in the retracted position, lie within grooves in the fuselage sheathing and by virtue of a partial conformity between the frame members and the grooves approach a substantially flush surface in that resistance to the air is decreased.

48. The second characteristic of the patent in suit relates to the closing of the slots in the fuselage when the landing gear is in an extended position. This feature is expressed by claims 4 and 6 of the patent in suit, and the terminology of these claims is found to be applicable to the Verville-Sperry Aeroplane as first manufactured, in which construction rubber sheeting was applied across the slots in the fuselage so that when the chassis was either in an extended or retracted position, the rubber sheeting would form a closure for the apertures in the fuselage. There is no disclosure of this construction in any of the prior art patents or publications.

49. The third characteristic of the patent in suit relates to a single diagonal strut adapted to receive both concussion and tensile stresses in cooperation with a swinging retractable chassis frame. This feature is expressed by claim 5. The invention in suit is specifically directed to a retractable landing gear and the terminology of claim 5 includes, as an element, "a swinging frame," the function and purpose of which is retractability. In the PW-8 Aeroplane construction, a single diagonal strut is utilized, but such strut is not for the function and purpose of strengthening a swinging retractable frame, but is for the purpose of transmitting stresses to a shock absorber. The terminology of claim 5 is not, therefore, applicable to the PW-8 Aeroplane.

If the terminology of this claim be applied to the fore and aft strut of the Loening-Amphibian plane, it is applicable with equal facility to the prior art French patent to Monin and Foucault.

Opinion of the Court

50. None of the claims of plaintiff's patent #1,306,768 involved in this case has been infringed. Claims 3, 10, 11, 12, 13, 14, 15, 17, 18, and 19 are invalid. It is unnecessary and we make no finding as to the validity of claims 1, 2, 4, 5, and 6.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff alleges unauthorized use under the act of June 25, 1910, 36 Stat. 851, as amended by the act of July 1, 1918, 40 Stat. 704, 705, by the War and Navy Departments of the United States of a patent granted to him in 1919, as set forth in the findings, for a certain aeroplane retractable landing gear. Defendant first filed a plea in bar claiming that if it had used any feature of plaintiff's patent it had a license to do so. This plea was overruled without prejudice and is now renewed. The other contentions of the defendant upon which it bases its defense that plaintiff is not entitled to recover are set forth in the preliminary statement preceding the findings of fact. Upon the whole record we are of opinion that plaintiff is not entitled to recover for several reasons which will hereinafter be mentioned.

1. If the features of the patent in suit, as expressed in the claims, alleged to have been infringed by the defendant can be held to involve invention, it is obvious from the facts that the grant under such claims is so narrow, in view of the prior art, that none of the features or elements of the aeroplane landing gear frame structures of the defendant can be held to have infringed plaintiff's patent. French patent, 111,574, to Penaud and Gauchot (Finding 29) discloses a retractable landing gear, the frame members of which are "housed in the general shapes of the nacelle", and points out that "impressions in the surface of the nacelle receive the different pieces of these legs." Given its ordinary meaning, we think this language discloses to a man skilled in the art the use of openings in the fuselage which are automatically closed, at least to the extent that the fuselage openings on the defendant's aeroplanes are closed by the landing-gear

frame members alleged to infringe when the landing-gears are retracted and the landing-gear frame members lie within such impressions. The language of the specification of this patent also discloses to a man skilled in the art the formation of the housings for a retractable landing-gear frame of an aeroplane, the openings of which housing substantially conform to the shape of the struts of the landing gear. We cannot assume that the provision for "impressions in the surface of the nacelle" to receive the landing-gear frame members when the landing gear is in a retracted position means impressions much larger or of different shape than the landing-gear frame members which such impressions are desired and intended to receive. The usual and ordinary meaning of such language is that such impressions in the fuselage to receive the landing-gear frame struts, when in a retracted position, would substantially conform to the dimensions of the landing-gear struts. This is especially true in this instance, inasmuch as the specification of this patent also points out that the place of the housing of the landing-gear frame members may be surrounded with coverings or suitable troughs.

Moreover, with reference to infringement, the file wrapper discloses such limitation with reference to claims 3, 10, 11, 13, 14, 17, 18, and 19 relating to the closure of the fuselage openings when the landing gear is in a retracted position that plaintiff is estopped to allege infringement by the Government structures disclosed and described in the findings. The broad claims originally made by plaintiff were rejected as not involving invention and as being anticipated. Thereafter, during consideration of the application, the claims were reframed and certain new claims were submitted. Upon further consideration certain claims with reference to a closure of the fuselage openings upon retraction of the landing gear so as to provide a substantially continuous outer fuselage surface were rejected as being anticipated by the U. S. patent to Francis referred to in finding 25. This action was taken prior to and on July 9, 1918. Thereafter, on September 20, 1918, plaintiff filed amendments of certain claims and added three new claims which afterward became claims 17, 18, and 19 of the patent in suit, and in a written

statement filed in support of the allowance of the claims over Francis stated: "The Francis construction is impractical in that his door does not form a flush closure and is closed by the operator after the storing of the chassis and independently of such storing operation. A favorable consideration of the claims presented herein is therefore respectfully asked." It will be seen therefore that plaintiff during prosecution of his application, which matured into the patent in suit, interpreted his claims relating to the matter of closing the fuselage openings as being limited to such a closure as would form a strictly flush fuselage surface. It is well established that a representation made to secure a patent narrows the grant, operates as a limitation, and is binding on the patentee; and that limitations imposed by an inventor, especially those introduced after rejection or proposed rejection of certain claims, must be strictly construed against the inventor and be looked upon as disclaimers. A limitation is not rendered ineffective because unnecessary and self-imposed.

2. Claims 3, 10, 11, 13, 14, 17, 18, and 19 are invalid for the reason that, in view of the prior art, they involve no more than the exercise of mechanical skill and are anticipated by U. S. Patent No. 1,083,394, January 6, 1914, to Francis (Finding 25) and French patent 474,585 to Lawrence (Finding 32). The patent does not, as plaintiff contended before the Patent Office, show a closure for the fuselage opening, into which the landing gears are retracted, which is operated manually by the pilot after the landing gears have been retracted. On the contrary the Francis patent discloses a closure for the fuselage opening which is operative automatically upon the extension or retraction of the landing gears and also discloses that this closure, when the landing gears are retracted, forms a substantially continuous outer fuselage surface. During the trial of this case plaintiff did not contend that the Francis patent failed to show an automatic closure, but raised a question as to the operativeness of the closure for the fuselage opening disclosed in the specification and drawings of the Francis patent. This objection was directed to drawing, Fig. 3, of the Francis patent and it was based upon the fact that in this

drawing, the bearing arm 36 and the connecting cable for automatically closing the opening in the fuselage are on one side of the plane of rotation of the wheel and the hinge of the door is attached to the fuselage on the opposite side. No contention was made or proof submitted at the hearing that the closure for the fuselage opening described in the drawings and specification of the Francis patent operated or was intended to be manually operated by the pilot after the landing gears were retracted. With reference to the operativeness of the structure shown in Fig. 3 of the Francis patent, defendant's expert witness Browne was asked, upon cross-examination, the following question: "I ask you as a patent expert whether it would be possible in any way to have that wheel come down to the ground completely enclosed between its cord and its bar if that were the case, and ask you to tell where the hinge is located. Also, now that you have interpreted that patent in that way [as functioning automatically] I would like you, because it is a very important thing, to state whether there is anything in the specification which corroborates that point of view." To this question the witness replied "There is nothing in the specification. I, myself, have sufficient doubts as to its operativeness so that I did not refer to this patent." This was the extent of the testimony of this witness concerning the non-operativeness of the structure and that opinion was based wholly upon inferences apparently drawn from the location of the hinge of door 37′ shown in drawing, Fig. 3. The court is not bound by expressions of opinions by expert witnesses. *Head* v. *Hargrave*, 105 U. S. 45; *The Conqueror*, 166 U. S. 110. Expert testimony as to the meaning of patent specifications is only permissible to enable the court to understand the specification, and if the court understands the specification without such testimony it is not necessary. *Cf. Kohn* v. *Eimer*, 265 Fed. 900. An expert may not be permitted to state that the omission of a connecting mechanism would be a "fatal fault." It is proper for the witness to describe the results of omission of the connecting mechanism but his opinion that the omission is a fatal fault goes beyond the province of an expert. *National Cash-Register Co.* v. *Leland*, 94 Fed. 502. A mistake in a particular draw-

ing does not render a patented device inoperative or prevent the court from considering the entire disclosure in the specification and other drawings of the patent as a proper reference in the prior art if, by considering the language of the specification and the drawings, it is clear what the patentee intended by the language used in the specification. As set forth in Finding 25, it is clear that the Francis specification has reference to the closing of all the apertures in the fuselage and relates to the rear landing gear, as well as to the landing gear in the forward portion of the plane. The language of the specification here pertinent, is, "when the ground wheels have been telescoped in the body the apertures of the chambers may be closed by doors 37′ * * * ." In other portions of the specification the patentee speaks of the "front wheels," the "forward wheels," and the "rear wheels." This language, when considered in connection with Fig. 2, as well as Fig. 3, of the patent, clearly discloses to a man skilled in the art a closure for the fuselage opening which is operated automatically upon the extension or retraction of the landing gears. It is also clear from consideration of the specification and drawings of this patent that it would be within the skill of an ordinary mechanic to hinge the door 37′ shown in Fig. 3 on the same side of the plane of rotation of the front wheels as the operating cable. See *Dicks Press Guard Mfg. Co.* v. *American Hardware Corp.*, 247 Fed. 338, 339, wherein it was held that although a prior patent showed the "gates swinging the wrong way the mistake is one which any mechanic could correct and does not affect the extent of the disclosure [of the prior art] to the skilled man." From the specification and drawings of the Francis patent we think it would also clearly be within the skill of an ordinary mechanic to place the front wheels of the aeroplane on the inside of bearing arm 36 as such wheels are shown in drawing Fig. 2 or to hinge the door 37′ on the inside of the fuselage sheathing so that the door would lie wholly within the pocket and flush with the outer surface of the sheathing, thereby providing a perfectly smooth fuselage surface when the landing gears are in a retracted position. In this connection see, also, finding 32 with reference to the French patent to Lawrence issued December 12, 1914.

The terms employed in a patent to describe the invention are to be interpreted reasonably with reference to the art to which it relates, and what a mechanic skilled in the art would be able to do with it. While a patent is not to be extended beyond its terms by construction, it is not to be made impracticable within them, having regard to the subject with which it deals, by a too literal and precise interpretation. *Daylight Prism Co.* v. *Marcus Prism Co.*, 110 Fed. 980. Inoperativeness of a structure is always open to scrutiny. Looking alone for the moment to the exact arrangement shown in Fig. 3 of the Francis patent, we think it is not a fact, assuming that the cord which operates to close the door 37′ is attached at a point on the door which would cause the cord when the landing gear is extended to extend under the tread of the wheel, that complete failure of the landing wheel to function would result from the cord extending across the tread of the wheel at the moment of landing. At most this would do no more than cause a momentarily slight braking effect alike on both wheels, and, as the cord extending from the door 37′ to the axle of the wheel is shown as being longer than the radius of the wheel, such cord upon landing would immediately pass to the rear of the point of contact of the wheel with the ground and thereby permit the wheel to function. Moreover, it may not be assumed that the point of attachment of the cord shown in Fig. 3 to the door 37′ is so positioned that such cord extends under the wheel at a point of contact with the ground upon landing. Fig. 3 is a cross-sectional detail of a portion of the aeroplane body and is, we think, susceptible to the interpretation that the cord is attached to the door 37′ at a point rearwardly of the point of contact of the wheel with the ground upon landing. Courts have never hesitated to define inoperativeness in a patent as a condition far removed from perfect or ideal operativeness. In such case we are not dealing with an exact science but with a mental concept in which some latitude must be extended to the physical and mechanical means of its accomplishment. Whenever, therefore, a device is objected to as inoperative because of a trivial fault in its showing or where a more obvious change would not differentiate the principle of the device but simply cor-

rect a mechanical inconvenience, the courts should not take a narrow view but, looking at substance rather than form, resolve such imperfections in favor of the patent. A patent should not be held invalid or inoperable for indefiniteness where the principle of operation is made clear and a skilled mechanic in the art would have no difficulty in following the directions of the patent. A patentee of a machine is not limited to the precise position and dimensions of parts shown in his drawings where it would render the device, or machine, inoperative and the specification shows that it was the intention so to proportion the parts as to produce a stated effect when the machine was operated. *Johnston* v. *Woodbury*, 109 Fed. 567. A device is not to be held inoperative "merely because a slavish adherence to the drawings develops obstacles which may in many cases be overcome by the exercise of common sense and ordinary mechanical skill." *Manhattan Book Casing Machine Co.* v. *Fuller Co.*, 204 Fed. 286. *Dalton Adding Machine Co. et al.*, v. *Rockford Milling Machine Co. et al.*, 253 Fed. 187, 191. In *Sparks-Withington Co.* v. *Jay*, 270 Fed. 449, 452, the court, in speaking of a patent urged as anticipatory, said: "We think the Tice device, as disclosed by him, cannot be pronounced inoperative in a patentable sense, although under many conditions likely to be met it would fail to function, and thus could not be successful commercially. But, testing the disclosure as we think we should by the rules applicable to a patent, the device, as described, did not lack invention merely because the inventor did not successfully bring his art to the highest degree of perfection, nor because, without changes in or additions thereto, it could not be successful commercially." In *Hildreth* v. *Mastoras*, 257 U. S. 27, 34, the court, in speaking of inoperativeness, said, "The machine patented may be imperfect in its operation; but if it embodies the generic principle, and works, that is, if it actually and mechanically performs, though only in a crude way, the important function by which it makes the substantial change claimed for it in the art, it is enough. *Telephone Cases*, 126 U. S. 1, 535; *Mergenthaler Linotype Co.* v. *Press Publishing Co.*, 57 Fed. 502, 505."

Francis made no claim in his application which matured into the patent 1,083,394 to him with reference to the closure for the fuselage opening, for the reason, which seems obvious, that the matter of providing means for the automatic closure of the fuselage openings did not, in view of the state of the art, involve more than mechanical skill. Cf. *Hazeltine Corp.* v. *Radio Corp. of America*, 52 Fed. (2d) 504, 510, and *Hazeltine Corp.* v. *Sears Roebuck & Co., Inc.*, 79 Fed. (2d) 238, 240, 241.

3. Assuming that plaintiff's patent was valid, although we have held to the contrary with reference to certain claims in (2) above, the record establishes that the defendant acquired a non-exclusive license to use the features of plaintiff's patent with reference to automatic closure of fuselage openings when the landing gear is retracted, as expressed in claims 3, 10, 11, 12, 13, 14, 15, 17, 18, and 19, under Navy Department Contract No. 52031 of October 28, 1920. The circumstances of the execution of this contract by plaintiff and the Government and the pertinent terms of the contract are set forth in findings 12 and 13. The contract was initiated by plaintiff and the terms agreed to involved payment to plaintiff of $3,000 for a set of Van Dykes for a retractable landing gear, and $3,000 for a retractable landing gear constructed in accordance with those Van Dykes. In accordance with the contract, plaintiff furnished defendant with a set of Van Dykes which showed in detail the claimed invention of the patent in suit as expressed in the claims mentioned. A Van Dyke is not simply a drawing or blue print but is an engineering drawing of such character that any number of additional working blue prints may be readily produced therefrom. The only useful purpose served by a set of Van Dykes would be to enable the Government to make blue prints in any desired quantity for construction of aeroplanes, or parts shown thereon, and we think it is clear that the Government would not have paid the sum mentioned for a set of drawings if it had not been understood and intended that the Government could and would use such drawings for the purpose and in the manner that drawings of that character are designed to be used. That

such use was intended and was authorized is shown by paragraph 4 of the contract, in which plaintiff agreed to indemnify the United States, and all officers and agents thereof, for all liability of any nature or kind on account of the infringement of any patent rights granted by the United States that might affect the adoption and use of the article contracted for, namely, the retractable landing gear for aeroplanes, or the work done under the contract, namely, the construction of a landing gear and the preparation and sale to the United States of the set of Van Dykes for the retractable landing gear. In Art. 4 the plaintiff agreed to protect the Government against the use of all patent rights granted by the United States that might affect the adoption or use of the articles contracted for, and it would be a strained and unreasonable construction of this contract to hold that this provision would not, likewise, apply to plaintiff's patents. No particular form of language or execution is necessary to grant a patent license. Patent owner's language or conduct indicating consent to its use constitutes a license for the patent. See *De Forest Radio Telephone Co.* v. *United States*, 273 U. S. 236.

The facts with reference to other contracts between plaintiff and the Government mentioned in the findings and with reference to plaintiff's offer in September 1920 to sell to the Government a non-exclusive license to use his patent for Army and Navy purposes only for one dollar do not, in view of the limitations and conditions disclosed, establish a general non-exclusive license to the Government.

4. The next question relates to the alleged infringement of claim 5 by the defendant's landing-gear structures on the Loening Amphibian aeroplanes and the PW–8 aeroplanes. Plaintiff's contention with reference to these infringements is adequately disposed of by finding 49. It is clear that the defendant's landing-gear structures as used on the Loening Amphibian and the PW–8 aeroplanes do not infringe any of the claims of the patent in suit and if any feature of such constructions could be held to be covered by claim 5 it would be necessary to broaden such claim far beyond all permissible limits and to such an extent that it would be clearly invalid

under the prior art. Claim 5 is a combination of old elements and plaintiff cannot claim infringement of the use of only one element of the combination. A swinging retractable landing-gear frame with an axle rigid therewith was old and had been used as early as 1912. See Flugsport, a German publication issued September 11, 1912, and Fig. 3 thereof containing an article by Von Oskar Ursinus, a civil engineer, describing the first German hydro-aeroplane race at Heiligendamn in 1912—Defendant's exhibit D-25-26. A strut forming a pivot connection with a retractable landing-gear frame was old and such an element is disclosed in prior structures. The use of a single diagonal strut member in connection with the retractable landing-gear to take both compression and tension strains during landing was also old. See finding 30 with reference to the French patent to Monin and Fouchalt, and the German patent, "Kondor" Aeroplane Works at Essen on the Ruhr. Although in the prior structures the diagonal strut had the same function as plaintiff's diagonal strut no prior art structure shows the use of a single diagonal in connection with a quadrilateral landing-gear frame on which both landing wheels are mounted, and neither does any of the defendant's alleged infringing structures contain this feature. The shock-absorbing mechanism supporting the main portion of the aeroplane on the chassis frame was not new. In these circumstances it is clear that Claim 5 has not been infringed, and, to say the least, it is extremely doubtful if anyone familiar with the prior art would have needed to do more than exercise mechanical skill to combine known elements and structures to attain the combination exhibited in this claim. In other words, it would be difficult to say, in view of the prior art, that this aggregation of old elements involved the exercise of inventive genius rather than mechanical adaptation.

5. Upon the assumption that the claims of plaintiff's patent are valid, the last question is whether claims 1, 2, 4, and 6 were infringed by the United States to such an extent as would entitle plaintiff to compensation for unauthorized use within the meaning of the Act of June 25, 1910, as amended by the Act of July 1, 1918, by reason of the facts set forth in the second paragraph of finding 42 relating to the Ver-

ville-Sperry aeroplanes and whether claims 3, 10, 11, 13, 14, 17, and 18 have been infringed by reason of the facts set forth in the last paragraph of finding 42 with reference to fairings attached to the landing-gear struts and aprons attached to the wheels by a pilot of one of the Verville-Sperry aeroplanes without authority or direction of the United States.

In this instance it is clear that no basis for the allowance of damages against the United States is established. No facts are alleged or shown which would indicate any profit to the manufacturer of these aeroplanes for the United States with reference to the rubber sheathing which was the only feature which could possibly be held to constitute a technical infringement. It is clear that no royalty could be allowed based on a saving in cost to the defendant by reason of the attachment of rubber sheathing, or upon the value to the defendant of such an arrangement. On the contrary the facts show that there was no saving in cost or value to the defendant for the reason that the defendant, before the claims were used, removed and discarded the rubber sheathing and lined the fuselage openings or troughs with metal, after which there was no infringement whatever for the reason that the retraction of the landing gears of these aeroplanes into such openings did not form a continuous outer fuselage surface. We think it is also clear that no royalty would have been paid for the mere right to manufacture if there was to be no use or sale of the infringing feature. It does not appear that the Government's order for the aeroplanes directed that the fuselage openings to receive the landing gears when retracted should be covered with rubber sheathing. Certainly when a device, even though it technically infringes, is immediately discarded and destroyed as soon as it is manufactured and is never used or sold nothing more than nominal damages could be awarded. This court cannot award such damages. *Marion & Rye Valley Railway Co.* v. *United States*, 270 U. S. 280; *Perry* v. *Uuited States*, 294 U. S. 330; *Sioux Tribe of Indians* v. *United States*, C–531 (1), decided November 9, 1936.

With reference to the fairings and disk-shaped aprons attached by the pilot to one of the Verville-Sperry aeroplanes,

which aeroplane the pilot used in participating in the Pulitzer Race in October 1923, it is established by the facts that the fairings and aprons were attached by the pilot on his own initiative and without official knowledge, authority, or direction of the United States. The aeroplane due to its mechanical difficulties did not finish the race. In these circumstances it is clear that there was no unauthorized use by the United States within the meaning of the pertinent statutes, and that the United States cannot be held liable for damages in this regard.

For the several reasons mentioned, plaintiff is not entitled to recover and the petition must be dismissed. It is so ordered.

Whaley, *Judge;* Williams, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

WILLIAM S. THOMAS v. THE UNITED STATES

[No. M-141. Decided March 7, 1938]

On the Proofs

Income tax; rebates credited to account of corporation president.—Where rebates received in connection with contract for purchase of material were credited to the personal account of president of the corporation, who was owner of all of the capital stock of the corporation, said president is held to be liable for tax on such amounts as income.

Same; corporate identity.—Where rebate checks were payable to corporation but were credited on corporation's books to the account of the president, they were not taxable to the corporation but to the president.

The Reporter's statement of the case:

Mr. J. Nelson Anderson and *Mr. Stanley Worth* for the plaintiff.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

Reporter's Statement of the Case

Plaintiff sues to recover $16,454.44, alleged overpayment of income tax for 1918 and 1919, on the ground that the amounts of $20,819.36 and $2,622.97 received by him during the years 1918 and 1919, respectively, under the circumstances disclosed hereinafter by the findings, did not constitute income to him.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff filed his individual income-tax return for 1917 on March 16, 1918, and the tax shown thereon was paid June 17, 1918. He filed his return for 1918 on March 15, 1919, showing a tax liability of $35,503.21 which was paid in installments during 1919. He filed his return for 1919 on March 15, 1920, showing a tax of $123.11, which was paid in installments during 1920.

2. In March 1924, additional assessments were made against the plaintiff for 1917, 1918, and 1919 in the respective amounts of $719.41, $13,358.61, and $7,036.31. The additional assessments for 1918 and 1919 were attributable, in part, to the inclusion in plaintiff's income of the amounts of $23,147.83 and $3,693.72, respectively, representing differentials or rebates held by the Commissioner to have been paid by the Continental Can Company to the Thomas Canning Company in 1918 and 1919, and which by direction of plaintiff were as received placed to the credit of his personal account on the books of the Thomas Canning Company in those years. The above amounts were in excess of the amounts actually paid by the Continental Can Company and received by plaintiff, as is hereinafter shown in finding 8.

3. July 3, 1924, plaintiff filed a surety bond staying the collection of the additional taxes assessed in March 1924. Said taxes and interest were paid by the plaintiff on October 9, 1926, as follows:

Year	Additional Taxes	Interest	Total
1917	$719.41	$109.59	$829.00
1918	13,358.61	1,935.31	15,293.92
1919	7,036.31	1,071.86	8,108.17
Total	21,114.33	3,116.76	24,231.09

The aforesaid surety bond was released and cancelled immediately after payment of the taxes and interest.

4. February 28, 1928, plaintiff filed a claim for refund in the amount of $21,926.51 plus interest for the years 1918 and 1919, giving as reasons in support thereof the following:

> The Commissioner erroneously and illegally collected from the taxpayer the following amounts for the taxable years 1918 & 1919 respectively: 1918 Tax 13,358.61; Penalty 667.93; Interest 300.77; Total for 1918 $14,327.31; 1919 Tax 7,036.31; Penalty 351.81; Interest 211.08; Total for 1919—7,599.20. Total for both years $22,703.46 by reason of the Commissioner's addition to the taxpayer's net incomes of $23,147.83 for 1918 and $3,693.72 for 1919 received by the taxpayer from the Continental Can Co. under a mutual mistake of fact. These amounts were repaid by the taxpayer in 1924. The taxpayer contends that these amounts were never income to him since they were impressed with a trust pending settlement of the misunderstanding and never unqualifiedly subject to taxpayer's demand. (*Carey Van Fleet*, 2 B. T. A. 825.)

The Commissioner of Internal Revenue by letter of September 12, 1928, notified plaintiff that the claim would be rejected on the grounds that there was not a mutual mistake of fact and that the amounts in question were not refunded. The rejection of the claim appeared on a schedule of September 21, 1928.

The claim for refund and the Commissioner's letter of rejection are plaintiff's exhibit 9 and are made a part hereof by reference.

5. September 30, 1929, plaintiff filed separate claims for refund for 1917, 1918, and 1919 in the amounts of $829.00, $15,293.92, and $8,108.17, respectively, on the ground that both assessment and collection were made after the statutory period of limitation had expired. The claims for 1917 and 1918 were rejected November 21, 1930, and the claim for 1919 was rejected December 13, 1929.

6. The Thomas Canning Company was a corporation organized under the laws of the State of Michigan in 1910, with its principal place of business at Grand Rapids, and

became known as the Thomas-Daggett Canning Company in a reorganization and consolidation in 1921. The plaintiff was the president and treasurer of the Thomas Canning Company from 1915 to 1921, inclusive, and owned all the stock except two shares, one of which was issued to his wife and the other to his bookkeeper.

7. By contract of March 1, 1915, negotiated and executed by plaintiff in the name of the Thomas Canning Company, it was agreed that the latter company would purchase from the Continental Company its entire requirements for cans for three years beginning March 1, 1915, and ending March 1, 1918. By letter of March 1, 1915, addressed to the Thomas Canning Company, the Continental Can Company agreed to allow certain rebates to the Thomas Canning Company on cans shipped to and paid for by that company under the contract of March 1, 1915. Checks in payment of the rebates were drawn by the Continental Can Company payable to the Thomas Canning Company. Upon receipt of these checks the Thomas Canning Company, at the direction of the plaintiff, credited the amounts thereof to his personal account on the books of the Thomas Canning Company during the period from March 1, 1915, to March 1, 1918. The Continental Can Company carried no account with the plaintiff personally.

The contract and letter of March 1, 1915, are plaintiff's exhibit 1 and are made a part hereof by reference.

8. By contract of June 12, 1917, between the Continental Can Company and the Thomas Canning Company, the latter agreed to purchase its entire requirements for cans from the former for a new period of three years beginning March 1, 1918. Although the new contract which became effective on March 1, 1918, did not provide for the payment of any rebates on purchases made thereunder, nor was any new collateral agreement in that connection entered into, the Continental Can Company continued to send rebate checks to the Thomas Canning Company as of March 1, 1918, and until 1920, totaling $23,442.33. Of this amount $20,819.36 was paid by the Continental Can Company in 1918 and $2,662.97 in 1919. Immediately upon receipt these rebates were, at the direction of plaintiff, credited to his

Reporter's Statement of the Case

personal account on the books of the Thomas Canning Company during the period from March 1, 1918, to the end of 1919. The contract above mentioned is plaintiff's exhibit 2 and is made a part hereof by reference.

9. By letter of May 13, 1920, and addressed to plaintiff, the Continental Can Company demanded repayment of the rebates totaling $23,442.33, on the ground that the rebates had been erroneously paid. On May 29, 1920, plaintiff wrote the Continental Can Company claiming that the terms of the second contract were the same as those of the first contract except that the price of tin plate was different.

10. May 22, 1924, a written agreement was entered into between the Continental Can Company, party of the first part, Thomas-Daggett Canning Company, party of the second part, and W. S. Thomas, party of the third part. Under this agreement party of the second part acknowledged indebtedness unto the party of the first part in the sum of $27,522, no part of which represented amounts theretofore credited to plaintiff's personal account by the Thomas Canning Company; the party of the first part acknowledged indebtedness unto the party of the second part in the sum of $6,415.27; and the party of the third part acknowledged indebtedness unto the party of the first part in the sum of $23,442.33 by reason of the payments of rebates or differentials, by mistake, in that amount. The contract pertinent to the issue in this case was as follows:

> THIRD. That in consideration of the party of the third part having secured the payment from the party of the second part to the party of the first part of the said sum of $24,697.16, and in further consideration of the party of the third part having secured from the party of the second part for the party of the first part a contract to purchase all of the can requirements of the party of the second part from the party of the first part, the said party of the first part hereby releases, discharges, and forgives the party of the third part from all claims and demands whatsoever arising from the aforesaid payment by the party of the first part to the party of the third part of the sum of $23,442.33 under the aforesaid mistaken belief that the said party of the third part was entitled thereto as differentials under the said contract.

The written agreement is plaintiff's exhibit 4 and is made a part hereof by reference.

All the aforementioned transactions with the Continental Can Company were negotiated and carried out, as described in the findings, by plaintiff in the name of the Thomas Canning Company, the entire capital stock of which was at all times owned by him, as stated in finding 6.

11. The Thomas-Daggett Canning Company borrowed $25,000 from a bank on its note endorsed by plaintiff and gave its check to the Continental Can Company in conformity with the terms of the agreement referred to in finding 10. The note to the bank was renewed several times, and on October 5, 1926, the balance remaining due on the note, together with interest, was $24,969.55. The bank thereupon called on plaintiff as endorser to pay the note, and on October 7, 1926, payment was made by the plaintiff. The bank later credited plaintiff's account with $2,813.14 received by it from the sale of collateral previously posted with the bank by plaintiff. The Thomas-Daggett Company failed and its stock became worthless. The Commissioner of Internal Revenue allowed plaintiff a deduction from income in the proper year of the amount paid by him on the note of the Thomas-Daggett Company.

The court held that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Except as to a small difference between the amount taxed to plaintiff on account of the rebates paid by the Continental Can Company and received by plaintiff and the amounts credited to his personal account on the books of the Thomas Canning Company and received by him during the years 1918 and 1919, the question is whether the rebates paid by the Continental Can Company and credited to and received by plaintiff in the years 1918 and 1919, in the respective amounts of $20,819.36 and $2,622.97, constituted taxable income to him.

From the facts it appears that plaintiff, who was the president and the treasurer of the Thomas Canning Company, a corporation, and owned all its capital stock, negotiated and made certain contracts with the Continental Can

Company for the purchase by the Thomas Canning Company of its entire requirements for cans, the first contract covering the period from March 1, 1915, to March 1, 1918, and the second contract covering the period of three years beginning March 1, 1918. These contracts were executed for the Thomas Canning Company by plaintiff as its president and treasurer.

The Continental Can Company, pursuant to its agreement in a letter written to the Thomas Canning Company March 1, 1915, allowed and paid certain rebates on cans shipped to and paid for by the Thomas Canning Company under the contract of the same date. The rebate checks were drawn by the Continental Can Company in the name of the Thomas Canning Company. Upon receipt of these checks the amounts thereof were, at the direction of plaintiff, credited to his personal account on the books of the Thomas Canning Company. The Continental Can Company carried no account with the plaintiff personally.

The second contract with the Continental Can Company which was negotiated and executed by plaintiff in the name of the Thomas Canning Company did not specifically provide for payment by the Continental Can Company of any rebates on purchases thereunder by the Thomas Canning Company, but the Continental Can Company continued after March 1, 1918, and until 1920, to send to the Thomas Canning Company rebate checks, as had been done under the previous contract. These rebate checks were drawn in the name of the Thomas Canning Company but upon their receipt the amounts thereof were, at the direction of plaintiff, credited to his personal account on the books of the Thomas Canning Company. The amounts so received and credited were $20,-819.36 during 1918 and $2,622.97 during 1919. The record does not show why these rebates were credited to plaintiff's personal account and thereby made subject to his personal demand and use without further corporate action, other than that plaintiff directed that this be done. There was no corporate action which indicated that these amounts belonged to or were claimed by the Thomas Canning Company as its funds or that they were being credited to plaintiff's personal account as dividends.

The facts and circumstances require the conclusion that plaintiff at all times regarded and claimed these rebates as belonging to him rather than to the corporation and that the Thomas Canning Company, likewise, regarded the amount of the rebate checks as belonging to the plaintiff. Whenever anything was done which was considered as corporate action, a record and minutes thereof were made by the attorney for the corporation at the direction of the plaintiff. No corporate action was taken in this case and no such record was made. The Treasury Department held in these circumstances that the amounts in question belonged to plaintiff and were income to him, and collected the resulting tax, and the evidence here does not overcome the *prima facie* correctness of that decision. The rebates were evidently regarded by plaintiff and the Thomas Canning Company either as commissions or compensation to plaintiff for negotiating and securing the contracts. The fact that the Continental Can Company later in a letter addressed to the plaintiff in 1920 claimed that the rebates under the second contract had been paid by mistake is not important to the question whether such amounts were income to plaintiff in 1918 and 1919. *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, 424. Plaintiff received under a claim of right the amount of the rebates paid by the Continental Can Company by checks drawn in the name of the Thomas Canning Company and used the same without restriction. Moreover, they were never repaid by plaintiff either to the Continental Can Company or to the Thomas Canning Company.

Counsel for plaintiff contend that the corporate identity of the Thomas Canning Company may not be ignored, and that if these rebates for 1918 and 1919 were subject to be taxed they were taxable to the corporation and not to the plaintiff. This contention is without force under the facts disclosed by the record. Plaintiff was the sole owner of the corporation and there is no evidence that the corporation ever regarded or claimed the amounts of the rebates as its property. The fact that the rebate checks were drawn by the Continental Can Company in the name of the Thomas Canning Company in accordance with the arrangement

Syllabus

with the Continental Can Company is not controlling. We think it is clear from all the facts and circumstances disclosed by the record that it was intended by plaintiff and the Thomas Canning Company that the rebates paid by the Continental Can Company belonged to plaintiff rather than to the corporation. All rebates paid by the Continental Can Company from March 1915, to the end of 1919 were credited to plaintiff's personal account immediately upon their receipt by direction of the plaintiff, in which the corporation acquiesced. In these circumstances the Commissioner of Internal Revenue was justified in holding that the rebates of $20,819.36 paid in 1918 and $2,622.97 paid in 1919 by the Continental Can Company and received and claimed by plaintiff constituted taxable income to him.

In determining the additional tax herein sought to be recovered, the Commissioner increased plaintiff's income for 1918 in the amount of $23,147.83 and for 1919 in the amount of $3,693.72 on account of rebates paid by the Continental Can Company. It appears, therefore, that the Commissioner overstated plaintiff's income for 1918 in the amount of $2,328.47 and for 1919 in the amount of $1,070.75. Plaintiff is entitled to recover whatever overpayments may result from the exclusion of the last-mentioned amounts from his taxable income for 1918 and 1919, respectively.

Judgment for such overpayments will be entered upon the filing by the parties of a computation showing the exact amount of such overpayments. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JACOB RUPPERT, A CORPORATION, v. THE UNITED STATES

[No. M-371. Decided March 7, 1938]

On the Proofs

Evidence.—The court took judicial cognizance of the fact that war-time prohibition did not go into effect until July, 1919, and that nation-wide prohibition did not go into effect until more than one year thereafter.

Reporter's Statement of the Case

Income tax; deduction for bad debts.—Under the Revenue Act of 1918, providing for deduction from gross income of "debts ascertained to be worthless and charged off within the taxable year," the two conditions which must be fulfilled are (1) ascertainment of worthlessness and (2) charging off of the debts.

Same; foreclosure.—Upon proper showing, a loss may be allowed even where there has not been a foreclosure, provided, however, there is a reasonable determination of worthlessness, and it must appear that a bona fide examination has been made of a debtor's solvency or value of securities pledged to secure the debt. *U. S.* v. *White Dental Mfg. Co.*, 274 U. S. 398.

Same; subsequent collections against bad debts.—A corporate taxpayer was not entitled to a deduction from gross income for "bad debts" in amount of debts charged off by it within the taxable year, where substantial collections were made on debts in subsequent years, in absence of any showing that taxpayer, before charging off debts, carefully examined accounts of debtors to ascertain debtor's solvency and collectibility of debts from sale of securities.

Same; failure to establish losses.—Where a taxpayer had failed to establish that it had made a reasonable ascertainment that debts charged off by it during the taxable year were then worthless, it was not entitled to the entire deduction claimed on the ground that amounts charged off were deductible from gross income as bad debts, or to a partial allowance based on partial collections of those debts in subsequent years.

The Reporter's statement of the case:

Mr. Harry Schwartz for the plaintiff. *Messrs. William N. Wood*, *H. P. Cochran*, and *C. Leo DeOrsey* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar*, Special Assistants to the Attorney General, were on the brief.

The court made special findings of fact as follows:

1. At all times herein mentioned plaintiff was, and now is, a corporation organized and existing under the laws of the State of New York, engaged in the brewery business.

2. On June 16, 1919, plaintiff filed its corporation income and profits tax return for the year 1918, showing a tax due of $142,715.78, which was duly paid. The return also in-

cluded the income of Jacob Ruppert Realty Corporation, Jacob Ruppert, Incorporated, and the Arctic Ice Manufacturing Company, as subsidiary corporations.

3. The amount deducted on the return by plaintiff for bad debts in 1918 was $1,382,471.58. The Commissioner of Internal Revenue upon audit of plaintiff's return disallowed $919,958.91 of the deduction for bad debts, and thereby increased the net income by that amount.

4. On July 28, 1926, plaintiff received from the Commissioner of Internal Revenue a so-called sixty-day letter setting forth a deficiency in plaintiff's tax for the year 1918 in the amount of $619,221.10. The additional tax was assessed on the amount disallowed for bad debts referred to in finding 3.

5. On August 28, 1926, the Commissioner of Internal Revenue assessed the additional tax referred to in finding 4, together with interest thereon of $18,780.20, making a total of $638,001.30, which was paid by plaintiff as follows:

On September 24, 1926, an overpayment for 1917 in the amount of $62,407.96 was credited to the deficiency for 1918.

On the same date an overpayment for the year 1919 in the amount of $453,117.09 was credited to the deficiency for 1918.

On the same date an overpayment for the year 1920 in the amount of $68,237.54 was credited to the deficiency for 1918.

On the same date an overpayment for the year 1917 in the amount of $709.43 was credited to the deficiency for 1918.

On September 30, 1926, the plaintiff paid to the Collector of Internal Revenue the sum of $53,529.28 to apply on the deficiency for 1918.

These credits and payment total $638,001.30.

6. By extension agreements the time for the determination, assessment, and collection of taxes for the years 1917, 1918, and 1919 was extended to December 31, 1926.

7. On August 28, 1930, plaintiff filed a claim for refund for the year 1918 in the amount of $618,000, giving as reason in support thereof that the Commissioner of Internal Revenue had failed to allow proper deductions for bad debts for the said year. The claim was disallowed September 4, 1931.

8. It had been the practice of plaintiff for many years to make loans to its customers, who were saloonkeepers, to enable them to purchase the necessary fixtures to conduct

their business, and, as security for such loans, to take chattel mortgages on the fixtures. During 1918, when plaintiff had on its books a large amount of debts of that character, a certified public accountant, who was employed by plaintiff to audit its books, examined these accounts with plaintiff's treasurer and its head bookkeeper and directed that they be written off to the extent of $1,761,471.86 as probably bad and uncollectible owing to the prohibition situation. At the time that direction was given, the effective date of prohibition, with its consequent effect on the business of these debtors, was approaching, and plaintiff had on hand a large amount of bar-room fixtures which had been secured by foreclosures and which were then of doubtful value. In addition to the debts secured by chattel mortgages it was also directed that certain unsecured loans, bills receivable, beer accounts, etc. totalling $90,892.64 be written off, making a total of $1,852,-364.50, and that total amount was written off plaintiff's books in 1918.

9. After the year 1918 plaintiff continued to do business with debtors whose accounts had been charged off as probably bad and uncollectible but chiefly on a cash or a short-time credit basis. The accounts written off and secured by the mortgages, amounting to $1,761,471.86, consisted of 678 separate accounts averaging $2,598.04 each.

10. In its return for 1918, plaintiff claimed a deduction from gross income on account of bad debts in the amount of $1,382,471.58. Upon his examination of that return in 1926 (referred to in finding 4) the Commissioner made the following allowance on account of bad debts:

Loss on Mortgages foreclosed	$282, 808. 07
Loss on Mortgages not foreclosed	64, 438. 94
Edw. J. McMahon Sec. Mortg	3, 857. 50
Foppania Chattel Mortg	5, 223. 75
Unsecured Loans and Bills Rec	66, 672. 80
Unpaid Beer Balances	23, 878. 95
Keg Deposit Accounts	283. 00
Adjustment Account	17. 10
Bottling Dept. Losses	3, 553. 32
Branch Office Losses	11, 779. 24
Total	462, 512. 67

At the time the Commissioner made that determination, he also made adjustments in plaintiff's returns for future years on account of debts written off by plaintiff in 1918 but disallowed by the Commissioner in his determination for that year, by allowing a deduction for the debts in the years in which foreclosures were had, or final settlement made with the debtors. Of the mortgages foreclosed after 1918 on debts written off in 1918, recoveries were had as follows:

Year foreclosed	Number of mortgages foreclosed	Amounts of mortgages	Credits before foreclosure	Proceeds on foreclosure
1919	76	$210,292.27	----------	$35,893.27
1920	57	187,693.64	$27,433.20	19,109.19
1921	43	118,439.87	21,991.34	11,093.41
1922	13	44,867.23	10,204.47	5,059.25
1923	3	11,011.42	1,677.53	1,058.10
1924	19	65,062.70	22,642.12	2,411.64
Totals	211	637,367.13	83,948.66	74,624.86

In addition, the accounts written off and not allowed by the Commissioner in 1918 included 359 accounts aggregating $838,875.74 which were secured by mortgages but with respect to which plaintiff made settlement after 1918 without foreclosure. On these accounts plaintiff recovered $402,-076.27 from the first of 1919 to October, 1924. The Commissioner gave the following explanation of his allowances on those accounts:

> Relative to mortgages not foreclosed, the losses have been allowed for the years in which the places were closed provided there were no subsequent recoveries. Where recoveries have been made subsequent to the year in which the place was closed, then the loss is allowed for the year in which the last recovery is received.

11. The record is insufficient to substantiate a finding that the debts which were claimed as a deduction by plaintiff and disallowed by the Commissioner were ascertained to be worthless during 1918.

The court decided that the plaintiff was not entitled to recover.

Opinion of the Court

WHALEY, *Judge*, delivered the opinion of the court:

In this case the plaintiff seeks to recover income and profits taxes paid for the year 1918. Various causes of action are alleged in the petition but all have been abandoned with the exception of one. The claim is made that the Commissioner erroneously disallowed a part of the deduction for bad debts which it had taken in its return for the year 1918.

The plaintiff was a corporation conducting a brewery business, prior and subsequent to the year in question, and enjoyed a large and extensive trade in the sale of its products. It encouraged and financially assisted the establishment of saloons by advancing financial aid to the owners of these establishments in the purchase of bar fixtures and took from them mortgages on these chattels.

In its return for 1918, plaintiff claimed a deduction from gross income for bad debts of $1,382,471.58, and upon an audit of that return, the Commissioner allowed $462,512.67 of that amount and disallowed the remainder, $919,958.91.

Section 234 (a) (5) of the Revenue Act of 1918 (40 Stat. 1077, 1078) provides for a deduction from gross income of "Debts ascertained to be worthless and charged off within the taxable year." This provision contains two conditions which must be fulfilled. The first is the ascertainment of worthlessness and the second is the charging off of the debts, both of which must take place within the taxable year for which the deduction is claimed. There is no question between the parties, and the record clearly establishes that the debts in question were written off during the year 1918. What remains for decision is solely whether the plaintiff has proved by the evidence that the ascertainment of worthlessness of these debts has been established in such a way as to overcome the decision of the Commissioner that there was not a reasonable justification for the charging off of these accounts as *worthless* during that year.

The record discloses that, as a result of the examination of its books of account, by three of its employees, plaintiff charged off chattel-mortgage debts in the amount of $1,761,-471.86 as worthless. At the same time plaintiff also wrote off $90,892.64 on account of unsecured loans, bills receivable,

and beer accounts, making a total of $1,852,364.50. The total of the chattel mortgage accounts written off consisted of 678 separate accounts and averaged $2,598.04 for each account. However, of the total amount charged off, plaintiff only claimed a deduction in its return of $1,382,471.58, a difference of approximately $470,000. The record contains no explanation as to why the entire amount of the debts written off as worthless was not claimed as a deduction and there is no explanation or reason given for this difference, or what became of it, or how it was treated. It is a reasonable presumption, where no explanation is given, that even the plaintiff did not take the ascertainment at face value. Doubtless the prohibition wave which was rolling over the Nation at that time was anticipated in arriving at what deduction should be claimed. However, the court will take judicial cognizance of the fact that war-time prohibition did not go into effect until July 1919, six months after these debts were charged off as "ascertained to be worthless," and that Nation-wide prohibition did not go into effect until more than one year thereafter.

Upon auditing the returns, the Commissioner allowed $462,512.67, as properly ascertained to be worthless, and disallowed the remainder, $919,958.91. The unsecured loans and the bills receivable and also all debts where the mortgages were foreclosed in 1918 were allowed and a small allowance was made on account of mortgages not foreclosed. The Commissioner's basis for his determination was primarily an allowance of a deduction for the debts in 1918 where the mortgages were foreclosed and a refusal of an allowance of a deduction where the mortgages were not foreclosed until subsequent years. Upon a proper showing, a bad debt may be complete enough for a deduction to be allowed even without foreclosure of a mortgage or without a showing that no more can ever be obtained from the debtor, although in future years something may be obtained on the debt. *United States* v. *S. S. White Dental Manufacturing Company*, 274 U. S. 398. However, there must be a reasonable determination of worthlessness; facts must be apparent that a bona fide examination has been made of the solvency of the debtor or the value of the securities pledged to secure the debt. It is not necessary to be "an incorrigible opti-

mist," as stated by the court in *United States* v. *S. S. White Dental Mfg. Co., supra*, but at the same time a taxpayer is not permitted to be a stygian pessimist.

The accounts which the plaintiff had at the end of 1918 were uncertain of collection and, as the main witness expressed it, were "probably bad or uncollectible." Nevertheless, we are here dealing with a statute which recognizes only debts which are ascertained to be *worthless* and a deduction on account of partial worthlessness is not allowable. Congress later permitted partial worthlessness. The record shows many of the debts charged off were far from worthless and collections were made in future years without the necessity of resorting to foreclosure proceedings. Furthermore, plaintiff's course of dealing with these debtors did not show a lack of faith in their ability to pay the loans in full or in part. The mortgages were not foreclosed immediately and the parties remained as customers, and collections were made on account from time to time. The plaintiff continued to deal with these debtors in 1919 and to extend credit to them. Of the amount written off by plaintiff over $550,000 was collected in subsequent years. This fact alone is indicative that there was not a reasonable ascertainment of worthlessness. The record does not disclose that the accounts of each of the debtors were carefully gone over and examined as to the debtors' solvency or as to the collectibility of all or any part from a sale of the chattels secured by the mortgages.

The testimony presents the evidence of the accountant, who had been employed by the plaintiff to audit its books. He testified that, together with the treasurer and the head bookkeeper, he investigated the accounts and "directed" that they be charged off the books as worthless. Neither the bookkeeper nor the treasurer testified and what knowledge they possessed of the solvency of the debtors, or how careful an examination they made of the accounts, the evidence does not disclose. With such a casual ascertainment of the worthlessness of these accounts, we are in no position to reverse the action of the Commissioner. The evidence is insufficient for us to make a finding of fact that a reasonable ascertainment of worthlessness had been established in 1918.

Syllabus

The plaintiff has suggested that, even if the entire deduction claimed can not be allowed, a partial allowance should be made, based on the partial collections had in subsequent years in respect to certain accounts. We are dealing with the year 1918 and not with what happened in future years and therefore this suggestion can not be entertained. The Commissioner did make allowances in future years on account of debts written off in 1918. Whether he was correct in that action, as a matter of law, we are not now concerned. At least, his course of action indicates a fair dealing by him with the plaintiff, as to which the plaintiff should not complain. The plaintiff having failed by a preponderance of the evidence to overcome the presumption of the Commissioner's determination that a reasonable ascertainment had not been made as to the worthlessness of these accounts, no recovery can be had.

The petition is dismissed. It is so ordered.

Williams, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

ORLEANS DREDGING COMPANY v. THE UNITED STATES

[No. 41951. Decided March 7, 1938. Motions for new trial overruled July 5, 1938*]

On the Proofs

Contract for dredging and levee work; construction of the contract.—The words "in any approved manner," when used without other limiting expressions with reference to performance of work, are construed to mean "sanctioned" or "endorsed" generally by those skilled in the business or occupation, and not as approved by one party to the contract.

Same.—Where the words "more or less" are used in the contract following directly after the figures stating the yardage to be moved and placed, the contract is not limited to the exact amount stated, and contractor is held to be entitled to be paid for all the work done under the contract.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Edgar T. Fell, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Orleans Dredging Company, the plaintiff herein, is a corporation of the State of Louisiana, with its principal office and place of business in the City of New Orleans.

2. On August 22, 1929, plaintiff entered into a contract with the United States, represented by John C. H. Lee, Major, Corps of Engineers, District Engineer, as contracting officer, whereby plaintiff agreed, as the contract recited, to—

> * * * furnish all labor and materials, and perform all work required for the construction of landside enlargement, Stations 1850–1998 and 2065–2190, inclusive, and riverside enlargement, Stations 1998–2065, inclusive, of Beulah to Lake Vermillion levee, on the left bank of the Mississippi River, material to be placed under *alternate method* as described in paragraph 39.1 of the specifications, subproject item No. 8, requiring about two million four hundred thousand (2,400,000) cubic yards of earthwork, more or less, for the consideration of thirty five and forty seven hundredths (35.47) cents per cubic yard, making a total consideration of approximately eight hundred fifty-one thousand two hundred eighty dollars ($851,280.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:
>
> Specifications for levee work dated June 22, 1929, numbered 1 to 39.8 and attached hereto. Drawing No. 3 showing the work and method of construction, and two sketches of alternate method, one for riverside enlargement, 60% complete, and one for landside enlargement, 70% complete, also attached hereto.

The contract provided that the work was to commence within 20 calendar days after the date of receipt by the contractor of notice to proceed, and be completed within 18 calendar months after the said date of receipt.

A copy of the contract is attached to the petition as plaintiff's exhibit C and is made part hereof by reference.

The "alternate method" required by the contract was described in subproject item No. 8 of paragraph 39.1 as

> placing * * * the required yardage hydraulically in any approved manner, but not necessarily up to grade, provided fill is placed on ground cleared of all timber and grubbed of all stumps and for stations 1850–1998 and 2065–2190 within the landside toe of the new levee prism and, for stations 1998–2065, inclusive, within 350 feet riverward from the center line of the existing levee.

Subproject item No. 8 further provided:

> In placing the material hydraulically, slopes shall be made continuous and away from the levee and in no case shall pockets of water be permitted to remain between the center line of the levee and the outer limits of the hydraulic fill.
>
> Bidders on alternate proposals shall submit sketches and descriptions of method proposed to be followed, including provision for drainage; which shall become part of the contract, if contract is made.

Among other provisions in the contract specifications were the following:

> 13. *Right of way and material.*—This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished by the United States * * *.
>
> 22. * * * In the event that the contractor proposes to do the work by hydraulic methods his plan of operation shall be submitted to the contracting officer for approval.
>
> 25. *Borrow pits—General.*—No earth shall be procured from the land side of the levees unless specifically provided for in paragraph 39. The location of borrow pits * * * will be designated by the contracting officer for each section of work advertised, and will be a part of the information furnished prospective bidders. When shown on maps or profiles submitted to bidders that earth cannot be obtained opposite stations it must be hauled from places designated without extra compensation.

Reporter's Statement of the Case

Both parties to the contract employed men who had had some experience in the hydraulic handling of earth; that is to say, the dredging, transportation, and deposit of earth moved by a hydraulic process. But it does not appear that extensive use had been made under varying conditions of hydraulic methods in furnishing a foundation for a levee.

The main problem in the work was the placing of the material pumped in the fills so that unsuitable material would not be deposited. It appears that the deposit of material in the fills may be largely controlled by the use of settling basins, spillways, baffleboards, etc., which were used by the plaintiff, sometimes in accordance with directions received from defendant and sometimes contrary to its directions. However, the evidence fails to disclose any approved method of controlling the placing of material by the use of such means. There is nothing in the testimony to show any rule or established practice in this respect but it does appear that different material required different methods. This was the case particularly with buckshot. The so-called buckshot as it lay in the borrow pits, to be hereinafter mentioned, was suitable for levee construction, but as shown in a subsequent finding it was so disintegrated in dredging as to present a problem as to how its suitability for levee purposes could be preserved when it was placed in the fill. The Government engineers had been working on this problem but had not solved it at the time the contract work was being done, and the contract specifications did not aid in the determination of how a deposit from buckshot could be placed in the fills in a satisfactory condition for levee purposes after it had been dredged and transported hydraulically.

3. As information furnished prospective bidders the plaintiff in due course had received from the United States Engineer Office at Vicksburg, Miss., by Major John C. H. Lee, District Engineer (the contracting officer) a notice to contractors dated April 4, 1929, of several projects, to be undertaken, among them the one here in suit, viz, the Beulah-Vermillion levee enlargement, describing it as located 402 levee miles below Cairo, approximate cubic yards 2,400,000.

consisting of landside enlargement Stations 1850–1998, riverside enlargement Stations 1998–2065, and landside enlargement Stations 2065–2190, "all material to be procured along the west banks of Lakes Beulah and Vermillion, by hydraulic methods."

Up to and including the date of execution of the contract the aforesaid prospective notice to bidders contained the only designation by the contracting officer of the location of borrow pits for the Beulah-Vermillion section, viz, stations 1850 to 2190, and in the contract itself were incorporated all of plaintiff's plan of operation, sketches, or descriptions of method proposed to be followed, that had been submitted to the contracting officer up to that time.

4. Notice to proceed was received by the contractor September 28, 1929, thereby fixing the time limit for completion March 28, 1931. Work was commenced about October 10, 1929, in the way of preparatory clearing for the riverside enlargement.

5. The two sketches attached to and made part of the contract show the placement of the fill required. There were first to be constructed comparatively small toe levees at the hypothetical toe of the contemplated new levee, the material for the toe levees to be excavated at the toe of the old (controlling) levee, without disturbing any material in the old levee, the excavation creating a ditch between the toe levee and the old levee. The fill was then to be deposited between the toe levee and the old levee, they acting as retaining walls. Under the hydraulic method of riverside enlargement 60% of the fill was to be within the section or limits of the new levee, and of the landside enlargement, 70%. After the fill had been completed the material so placed by the plaintiff, inclusive of the toe levee, was to be used by the Government for bringing the increased levee to the required grade and section, work that was not included in plaintiff's contract.

The material to be placed by plaintiff was thus to be partly in and partly outside the section of the new levee, was for levee building purposes, and both parties understood that it had finally to be material suitable for levees, except

where it was used to fill old borrow pits pursuant to the contract.

Before dredging and filling could be begun the contractor had to construct in advance a sufficient extent of toe levee to retain a progressing fill. The toe levee could not be constructed until the contractor was furnished so-called "construction notes" by the Government. The construction notes gave the dimensions of the fill, the location of the center line and toe of the new levee, and the yardage to be placed, station by station.

A full plan of operations could not be furnished by the contractor before he received construction notes and was assigned the borrow pit or pits from which he was to dredge material for the fill.

The dredge used on the job, except for a short interval not here material, was a Diesel-powered dredge of 24″ pipe capacity, known as the "Diesel," and efficient. The material was dredged with a revolving cutter and with water forced through the 24″ pipe to a point of discharge in a settling basin, between old levee and toe levee, at the far end of which settling basin was raised a crossdike connecting the two levees, short of which there was erected a spillway through the toe levee, of timber, substantial enough and so adapted as to withstand the erosion of water. The spillway was constructed at the natural ground level and served as an exit for the water coming from the discharge pipe and flowing through the settling basin, and it was necessary that there be placed across it baffle boards in such manner that they could be increased or diminished in height according as the plan was to raise or lower the level in the settling basin. The purpose of the settling basin was to give the earth ejected from the discharge pipe an opportunity to settle, in whole or in part, in contract limits, the nature and quantity of the settlement being due to the kind of material, the velocity of flow, and depth of the water. When the water reached the top of the baffle boards, the rate of discharge thereover about equaled the rate of discharge of water from the discharge pipe, and the raising or lowering of the baffle boards determined the quantity of water kept in the basin

for settling purposes. An excessive amount of water kept in the settling basin was known as "ponding."

The full toe levee, built as a retaining wall for the fill in the settling basin, parallel to the existing levee which formed the opposite wall, was on an average about 12 feet high, with a base about 40 feet wide, taking natural slopes, and the ditch from which material was excavated for the toe levee, between location of the toe levee and the toe of the existing levee, was of corresponding cubical dimensions down through the natural surface of the ground.

The spillway having been constructed at the natural ground level, there was formed in the initial discharge into the settling basin, a substantial pond of water, until the rise was sufficient to reach the base of the spillway.

The enlargement of the existing levee from Stations 1850–1998 was known as the upper landside enlargement, being at the northern end of the work and on the landward side of the levee; that from Stations 1998–2065 the riverside enlargement, being riverward of the levee; and Stations 2065–2190, the lower, that is southernmost, landside enlargement. The distance from station to station was 100 feet, making the upper landside enlargement of the existing or controlling levee 14,800 feet, the riverside enlargement 6,700 feet, and the lower landside enlargement 12,500 feet, a total distance of 34,000 feet. 5,000 feet constituted a levee mile, making the total distance 6.8 levee miles or 6.44 statute miles.

6. On October 22, 1929, the contractor made the following written request of the contracting officer:

> We enclose herewith map of the Beulah-Vermillion Project, in duplicate, showing the right of way for dredge pits which we request be furnished us.
>
> It is our intention to use the material from the Mississippi River to opposite the spur near Station 2180, in making a part of the landside fill opposite Lake Vermillion, and as the material dredged from this portion of the pit will probably be sufficient to take the fill to a point near station 2150, we would then like to move up Lake Vermillion and cut into the west bank of the lake at some satisfactory point to get back into the pit. The amount of material which will be dredged in the lower right-of-way will depend on the

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stage of the river at the time the dredge commences work. *Our reason for requesting* a large right-of-way around the Beulah Crevasse is so as to enable us to make as large a portion of the fill from *the buckshot ridge*, which lies on the east side of this crevasse hole, as possible. *We have found very good material in Lake Beulah and on the west bank* thereof from opposite station *1900 south and desire the right to dig in the Lake on the west shore as conditions may make advisable*. The material available in Lake Beulah north of station 1900 is not desirable, from our point of view, for the fill and we accordingly request the right to obtain material for the fill from station *1850 to 1900 from the pit shown opposite the lower end of piece number seven, as this material is much better for hydraulic filling*. This pit will not interfere with the work of the contractor on piece seven as his work on this portion of that contract will doubtless be completed by the time we are ready to dredge from this point.

On account of our experience at Rosedale, we have requested more right-of-way for dredge pits than will be needed to complete the work, so that we may change our pit location without additional resuest, in order to avoid pockets of undesirable material which will be encountered from time to time. This request will not increase the expense of obtaining the right-of-way as we understand that the Levee Board will obtain this right-of-way with an agreement to pay for only that portion that may be used.

We will appreciate your early action on this request so that the work of clearing this right of way may be started as soon as possible.

This letter not having been replied to, a second request was made by the plaintiff November 9, 1929, concluding as follows: "We * * * would ask that you endeavor to arrange for at least that portion commencing at the river and going along Lake Vermillion, so that we can commence the clearing of that portion during the coming week."

November 10, 1929, defendant's area engineer in charge of the work offered the contractor construction notes for 500 linear feet of the job on the lower landside enlargement. For practical purposes 500-foot construction notes were too short, and the contractor objected to them. The offer was limited to 500 feet by the area engineer because defendant's

engineers had not yet come to a conclusion as to the length of settling basins they desired, and wished to prevent the contractor from pumping until that question had been decided.

Plaintiff's first dragline was moved on to the job about November 11, 1929, at the lower end of the lower landside enlargement.

On November 12, 1929, plantiff communicated by letter to the contracting officer as follows:

> Referring to the above contract request is made for a decision by the Contracting Officer as to whether the landside enlargement is to conform to the Class C section as shown on drawing Sheet 3 accompanying specifications Serial No. 29/370, or whether this landside fill shall conform to Par. 19 of the general specifications.
>
> We are ready to commence the building of toe levees necessary before filling can commence, and now have our dragline at Station 2190 waiting for construction notes, before we can proceed. Request has been made of the Area Engineer in charge of the Northern Area at Rosedale, for the necessary construction notes, but he advises that he cannot furnish us with notes until he sees the class of material as it is actually pumped into the fill, and he further states that he cannot then furnish us with notes for more than 500 feet of this landside enlargement at one time. Our bid on this alternate project was based on the drawings accompanying the specifications, and on other information furnished us previous to the letting by the Area Engineer at that time, that the back slope where the landside enlargement was to be made would be made to the "C" section. We contemplated putting in 70% of the required enlargement inside a back slope of 8 to 1, which would allow us to make our fill with a 12 or 15 to 1 slope which is all the available material will take. Any change making the back slope steeper than 8 to 1 will necessitate that we place our fill with a proportionately steeper slope, which we do not believe possible. Further, if the toe distances on the landside slope are varied from station to station in accordance with the material, the toe levees cannot be constructed in advance and the work then cannot proceed.
>
> We have made arrangements to take care of our drainage through the canals adjacent to the work, and in order that this may be done we feel that we should

> at least be allowed to construct these toe levees far enough in advance to accomplish this purpose and to insure that the dredge will not be delayed by the lack of toe levees at any time.
>
> For your information we enclose copy of a letter addressed to the Area Engineer at Rosedale. Our dragline is now idle on the site and we would appreciate your early decision on these matters. Our hydraulic dredge will be ready for filling shortly after December First.

On the same day, to-wit, November 12, 1929, the plaintiff addressed the following letter to the Area Engineer, which is referred to in the letter to the contracting officer:

> Referring to our conversation in your office yesterday at which time request was made that we be furnished with construction notes giving the toe distances and the yardage required on the landside enlargement on the above mentioned project. In view of your statement that toe distances could not be given us until we had started pumping, and you had had an opportunity to determine the class of material to be placed in the fill, and in view of the fact that you feel that at no time can you furnish us with more than 500 feet of construction notes, we feel obligated to refer these matters to the District Engineer for his decision. We regret that such action on our part is necessary.
>
> As explained to you yesterday our bid on this work was based on information contained in Sheet Number 3 of the drawings supplied bidders accompanying specifications serial Number 29/370 and also on information supplied us previous to the letting by the Area Engineer in charge at that time, Mr. W. L. Lipscomb. The drawing mentioned shows that landside enlargement Stations 1850–1998 and Stations 2065–2190 shall be by hydraulic method to the class C section and further indicates that this section was desired by showing typical sections at Stations 1900 and 1975 showing an 8 to 1 back slope. The Area Engineer at that time also informed us that the landside enlargement would be constructed to the C section back slope in verification of this. The back slope required had a great influence on our bid as under the alternate proposal we cannot be paid for material beyond the toe of the theoretical enlargement. Had we been given to understand at the time of the letting that it was contemplated to vary the slope on this landside enlargement we would prob-

ably not have submitted a bid on the project. We are of the opinion that in this case the general specifications Par. 19 do not apply and that the special specifications as indicated on the drawings made a part of the contract should govern. We now are ready to start constructing the toe levee for the landside fill commencing at Station 2190 and shall hold the United States responsible from this date for delay to the prosecution of this contract until construction notes are furnished us so that we may construct this levee which is a necessary preliminary before filling can commence. We cannot make this fill in 500 foot sections as this will not allow us to take care of our waste water. For your information we intend taking care of this water by using the drains which take off from the landside pits at various points, and we have obtained permission from the drainage boards to use their canals for this purpose. In order to properly care for this water it is necessary that we be allowed to construct sufficient toe levee to guide the flow of water to these drainage canals. Further from the yardage required from Station 2190 to 2182, which has been computed in your office, 500 feet of toe levee will allow us to operate our dredge only about 24 hours before we would be required to shut down to wait for the dragline to construct another 500 feet. We feel sure that you have not taken into consideration the type of plant to be used on this work in contemplating such a limit, as you are of course aware that a 24″ hydraulic dredge cannot operate under such conditions.

It is our desire to carry on this work in a manner thoroughly satisfactory to you and the District Engineer, but we cannot obviously do so if conditions such as these are imposed.

We are today addressing the District Engineer asking for a decision on these matters, and are sending him a copy of this letter. Our dragline is now at Station 2190 waiting for the construction notes requested, and we beg to notify you that we are being delayed by causes beyond our control, and that we shall expect the time we are delayed to be added to our contract time.

On November 13, 1929, the contracting officer advised plaintiff that immediate steps were "being taken to condemn the necessary right of way."

7. The contractor found that, due to a rise in the Mississippi River about the middle of November 1929, he would

soon be able to move his dredge into Lake Beulah, at the north end of the work, and so he decided to commence operations at Station 1850 southward, instead of at Station 2190 northward, as he had originally planned. He immediately began tracking his dragline from the lower to the upper end of the project.

8. It was necessary for the contractor to have more than 500 feet of construction notes, in order that he might be able to build a settling basin of practical dimensions. The contract was silent on the length of settling basins. Defendant's engineers claimed the right to restrict the contractor as to length, and the contractor claimed that under the contract the matter of length was within his own discretion. A conference was held between representatives of defendant and a representative of plaintiff November 19, 1929, at which it was determined by defendant's officers that on the upper landside enlargement the settling basins should not exceed 2,000 feet, and this determination was acquiesced in by the contractor. Prior to the arrival of the dredge the contracting officer would not permit the contractor to construct an indefinite length of full toe levee, for the reason that high water was impending, and the ditch at the landside toe of the old levee, created by excavation of material for the toe levee, would endanger the integrity of the old levee. Had the dredge been ready to operate it could have quickly refilled the ditch if the necessity had arisen.

The dragline, tracked from the lower end of the project, arrived at the upper end November 28, 1929, and was then and there available for the construction of the toe levee. On that date the area engineer caused to be given to the contractor 4,000 feet of construction notes, southward from Station 1850, and the contractor was by him then authorized to construct a full toe levee, some 12 feet high, for a distance of 2,300 feet, 300 feet over the permitted 2,000 feet of a settling basin, and 1,700 feet of partial toe levee, 5 feet high, with full base, down to Station 1890, which the contractor did before he commenced pumping operations.

9. One of the pits requested in the contractor's letter of October 22, 1929, Finding 6, described therein as "the pit shown opposite the lower end of piece number seven," was

afterwards known as Pit A. The material therein was predominantly buckshot and was considered very desirable material by the defendant. The Board of Mississippi Levee Commissioners acquired Pit A December 11, 1929, for use on the Beulah-Vermillion levee enlargement. Pit A was thereafter designated by the contracting officer for use on the upper landside enlargement and the material therein furnished the contractor by the United States by the time plaintiff was prepared to begin dredging operations.

10. On December 20, 1929, the contractor requested a change in the contract, permitting him to conduct operations on the lower landside enlargement by means of a clamshell dredger, taking material from the west side of Lake Vermillion and rehandling over the main levee, in lieu of an hydraulic dredger, the contractor representing that the material there was not satisfactory for hydraulic handling, that the separation that takes place in pumping would be avoided, that more than the contract 70% would thereby be left in place, that the clamshell dredger could be working during the same period as the hydraulic dredger thus advancing completion, and giving other reasons.

On January 13, 1930, the contracting officer consented to the change under certain conditions, which were not accepted by the contractor, and the change was not made.

11. About the middle of January 1930, before he commenced pumping operations, the contractor was given additional construction notes for the upper landside enlargement from Station 1890 to Station 1998, but was given permission at that time to build only a partial toe levee, 5 feet high, from Station 1890 to Station 1998, the reason being that a full ditch incident to a full toe levee would have endangered the old levee. A five-foot toe levee was not high enough to retain the fill in a settling basin, and its sole purpose for the time being was to prevent overflow of the foundations below the settling basin that was then being filled up. The specifications required the foundations to "be thoroughly broken and turned to a depth of 6 inches." Overflow of the foundations by the effluent from the settling basin would deposit material and so wet and

foul the foundations as to make the preparation thereof slow and difficult. The small toe levee, first erected, was to be left in place and merely added to to bring it up to full height of around 12 feet.

The effluent from the settling basins at the upper end of the work flowed first into old borrow pits (which extended the full length of the upper landside work, viz, from Stations 1850 to 1998), where it settled again and then drained into Clear Creek drainage district. The old borrow pits were turned into settling basins by the contractor, erecting a small dam at their outlet for that purpose, this being necessary to prevent clogging up the ditches in the drainage district with material not retained in the fill. The building of this dam caused water to back over the foundation below Station 1935, as will hereinafter be further described. The contractor built other dams or dikes outside the borrow pits to prevent overflow of farm land.

12. Plaintiff's dredge, the "Diesel," arrived at the site of the work January 12, 1930. It was placed in Pit A, connected up with the pipe system to the first settling basin, Stations 1850 to 1870, and started pumping January 28, 1930.

The end of the discharge pipe was first placed at Station 1850 or thereabouts, and was thereafter advanced and set back from time to time as conditions required.

The spillway was closed and the crossdike cut at Station 1870 February 23, 1930, with the end of the discharge pipe at or near Station 1857, 1,300 feet back from the crossdike at Station 1870, and 3,300 feet distant from the crossdike, at Station 1890. The discharge pipe had previously progressed to about Station 1866, 400 feet distant from the then intact crossdike and spillway at Station 1870, and was on February 23, 1930, used in making a second lift, that is, depositing levee material over that already deposited to bring it up to the agreed section.

The second settling basin extended from Station 1870 to Station 1890, and the crossdike was breached and the spillway closed at Station 1890 March 15, 1930, with the end of the discharge pipe at or near Station 1866, 2,400 feet dis-

tant from Station 1890, and 3,900 feet distant from the spillway and crossdike at the end of the next settling basin at Station 1905. The end of the discharge pipe had previously been advanced to Station 1875, and brought back for a second lift.

On March 15, 1930, the effluent from the spillway began to overflow the foundations of the enlargement principally from Stations 1935 to 1976, due to failure of the contractor to build sufficient partial toe levee in advance to prevent the backing up over the foundations of effluent unable sooner to find an exit into the drainage system through the old borrow pits dammed up as described in Finding 11.

13. On March 9, 1930, at a time when the dredge "Diesel" was not pumping, the defendant's chief of operations in charge of the work, Major T. B. Larkin, defendant's area engineer, Edgar S. Maupin, and its inspector, William J. New, inspected the fill, and found below, that is, south of Station 1882, a small deposit of silt. Area Engineer Maupin attributed the deposit of silt to high placing of baffle boards in the spillway and a consequent ponding of water in the section, allowing silt to deposit instead of discharge through the spillway. On that date, March 9, 1930, he communicated with the contractor by letter as follows:

ORLEANS DREDGING CO.,
Leyser Bldg., Greenville, Miss.
In Person to Captain Cole,
Representative, Beulah-Vermillion Contract.

GENTLEMEN:

You are hereby directed to remove baffle boards from the spillways at the ends of your 2000′ settling basins on the Beulah-Vermillion contract.

The reason for this is to prevent the formation of silt pockets and give a free and unrestricted flow of runoff water from the several settling basins.

Very truly yours,

(Signed) EDGAR S. MAUPIN,
Edgar S. Maupin,
Senior Engineer.

cc to District Engineer, Vicksburg Engineer District, Vicksburg, Miss.

March 11, 1930, the plaintiff replied to this order as follows:

Replying to your letter dated March 9, 1930, addressed to this company and delivered to Captain Cole on the Beulah-Vermillion Contract, directing that the gates in our spillways be removed due to your feeling that the use of these gates will cause the formation of silt pockets.

We respectfully decline to remove these gates as you have directed, as the use of these gates is necessary in our opinion, both to retain material in the limits of the fill and as a means of preventing damage to private interests. These gates will not cause the formation of silt pockets in the final fill. Furthermore your order will interfere with the detailed method of operation on this contract and therefore exceeds the rights granted the United States by the contract and specifications.

Referring to the statement made by you yesterday that you would withhold any estimates due us until the directions referred to are carried out, it is our opinion that such action cannot properly be taken. We are not violating in any manner the contract, or the specifications. We are, as you know, placing material in the limits of the fill by the method prescribed in the contract from a borrow pit furnished us by the United States, in the event that by reason of the use of the method prescribed some of the material furnished us becomes objectionable to the Contracting Officer after being placed in the fill, we shall be glad to waste this material in accord with paragraph 24 of the general specifications, at the contract price per cubic yard if directed by him to do so. The runoff water from our operations now has a free and unrestricted flow, the gates in use merely serving to retain a part of the material that would otherwise escape through the spillway in such a short settling basin."

To this letter the contracting officer responded by wire March 12, 1930, as follows:

Area engineer advises that you refuse to remove baffle board from spillway of your exit for discharge of waste water on your Beulah-lake Vermillion contract, thereby pocketing water between the center line of levee and outer limits of hydraulic fill stop as this is violation of specifications no payments will be made.

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There ensued other correspondence between the contractor and the contracting officer, or his representative, with reference to operations on the upper landside enlargement. Therein the contractor maintained that removal of the baffle boards would cause excessive loss of material and the material so lost would injure the neighboring drainage systems, and that any unsatisfactory material would be gladly removed at the contracting officer's direction. The contracting officer, on the other hand, maintained that under the contract the contractor was required to deliver satisfactory material at the site of the enlargement; that the material then being there deposited was unsatisfactory; that the plan of operations was subject to the approval of the contracting officer; that the method of operation employed by the contractor deposited silt, which was unsatisfactory because it would not support other material and would slough. In a letter to the contractor March 31, 1930, he concluded:

> I am of the opinion that this material in question is unsatisfactory and will slough. Therefore, I cannot authorize any payment for this doubtful material.
>
> The material in the borrow pit is known to be satisfactory material. The only way in which such material can become unsatisfactory is due to the method of placing. Your method of placing, under paragraph 22 of the specifications is necessarily subject to the approval of the contracting officer. This authority is being invoked only when necessary to guarantee the fulfillment of the contract, namely, to provide essential material for levee protection and to safeguard the interests of the people and lands lying behind the levee.

14. The order to remove baffle boards from the spillways was not obeyed by the contractor. He endeavored to and did, while operating from Pit A, retain in the fill all the material that he could, keeping the flow through the spillways as clear as he could.

The buckshot as it lay in Pit A was a union of fine sand, silt, and clay. In its natural state it was satisfactory levee material and was bound together by the clay. Sufficiently agitated in water, the buckshot would separate into its three elements, and once separated they could not again be so

brought together in the fill as to bind and form satisfactory material for levee construction.

The material as it came out of the discharge pipe was comprised of water, fine sand, silt, clay, and solid buckshot. The solid, or undisintegrated buckshot, came out in lumps of various sizes, and settled close to the end of the discharge pipe. When dried, it formed satisfactory material; when wet it was slippery and showed a tendency to slide. The fine sand was carried on a little farther, then the silt was deposited and little or no clay in suspension was retained in the fill.

Homogeneity of material in the fill, that is to say, uniform distribution of the various elements (exclusive of water) coming from the discharge pipe, is best attained by uniformity of flow and maintenance of a constant distance from end of the discharge pipe to the outlet of the settling basin.

In pumping from Pit A the contractor's object was to retain in the fill all the material (aside from water) that he had pumped from the pit; the endeavor of the contracting officer and his representatives was to have expelled from the settling basin, before it had a chance to settle, all the silt and clay that had in the process of agitation become separated out of the buckshot. It was not possible in the process to reunite the binding element, clay, with the other parts of the buckshot and it was carried out as effluent material. There resulted a deposit of silt, substantially unmixed with other elements, in the fill from Station 1882 southward on the upper landside enlargement.

Silt did, in fact, in the upper landside enlargement, support buckshot superimposed upon it and by the method of operation used there were left in the upper landside enlargement fill sections or areas of silt surrounded or covered up by other material.

A substantial aggregation of silt endangers the integrity of a levee and is unsuitable. When exposed to the action of water it is easily eroded.

The evidence is not satisfactory as to whether it was necessary to remove the baffleboards from the spillways and

permit a free and unobstructed flow of runoff water from one or more of the settling basins in order to prevent the formation of silt pockets or deposit of the material classified by the contracting officer, as hereinafter related, as objectionable.

15. The third, fourth, and fifth settling basins on the upper landside enlargement were each 1,500 feet in length, a length less than the required 2,000 feet and chosen by the contractor for his own convenience.

The third settling basin extended from Station 1890 to Station 1905 and the spillway was closed and crossdike breached at Station 1905 April 1, 1930, when the end of the discharge pipe was at or near Station 1888, 1,700 feet back from the crossdike and spillway at Station 1905, and 3,200 feet from Station 1920.

The fourth settling basin was from Station 1905 to Station 1920 and the spillway was closed and crossdike cut at Station 1920 April 23, 1930, with the end of the discharge pipe at or near Station 1899, 2,100 feet from Station 1920 and 3,600 feet from Station 1935.

The fifth settling basin extended from Station 1920 to Station 1935, and the spillway and crossdike at Station 1935 were used intact up to April 26, 1930, at which time the end of the discharge pipe was at or near Station 1906+60, 1,340 feet distant from Station 1920, and 2,840 feet from Station 1935.

At that time, April 26, 1930, the dredge "Diesel" ceased pumping from Pit A, material there that was available having been for practical purposes exhausted.

In all, the contractor pumped from Pit A 621,131 cubic yards of material, 210,422 cubic yards of which were accepted by the Government in the fill, 138,722 cubic yards of which were rejected in the fill as unsuitable, and 38,832 cubic yards of which were also rejected because superimposed upon the unsuitable material (as will hereinafter appear), representing a wastage through the spillways of 233,155 cubic yards, or 37.5%, in the process of dredging from Pit A.

If the contractor had so adjusted the baffle boards as to waste also the rejected 138,722 cubic yards through the

spillways, the wastage therethrough would have been 371,877 cubic yards, or 59.9%.

If the contractor had used on the upper landslide enlargement, Stations 1850–1998, one settling basin only, with one spillway, the wastage would have been about 93,170 cubic yards, or 15%.

16. Theretofore, on April 1, 1930, the contractor communicated with the contracting officer by letter as follows:

> We will exhaust the present borrow pit at Beulah Vermillion in the next few days. We enclose herewith a drawing showing the location of another pit which will be necessary so that we can complete the upper portion of the landside enlargement adjoining Lake Beulah.
>
> The material in this pit is a good grade of sand overlaid with soft clay or buckshot.
>
> We request that this new pit be furnished as quickly as possible and will appreciate your immediate attention.

The borrow pit thus requested was on the northern bank of Lake Beulah and extended from opposite Station 1850 to opposite Station 1975. This request the contracting officer by letter of April 7, 1930, refused, on the ground that the pit contained a large percentage of unsatisfactory material, and suggested that there might be satisfactory material on the south bank of Lake Beulah at about Station 1900.

On April 10, 1930, the contracting officer by letter ordered the contractor to prepare properly the foundations that had been overflowed with the muck from the spillways by removing the deposit and breaking the ground as required by the specifications.

From the refusal of the contracting officer to furnish the borrow pit requested in the contractor's letter of April 1, 1930, the contractor on April 13, 1930, appealed to the president of the Mississippi River Commission, Brigadier General T. H. Jackson, who gave his decision to the contractor April 19, 1930, by wire as follows:

> Reference to telegraphic appeal and decision of Major Lee comma inspection by myself on eighth and by member of my staff since indicates it is undesirable

to open borrow pits on west [north] bank of Lake Beulah for use in extension of present work until levee foundation is properly prepared in accordance with paragraph twenty of specifications stop this preparation is impossible at the present time on account of condition of the right of way created by your method of work stop in order to allow you time for preparation of this foundation in accordance with paragraph twenty and to prevent delay to your work district engineer has been directed to furnish the borrow pits for use along lower portion of your contract stop he has also been directed to prescribe under paragraph seventeen of specifications that on exhaustion of your present borrow pit that you commence work in vicinity of station one nine nine eight stop this action will prevent both delay and expense to you stop the question of detail location of borrow on west [north] bank of Lake Beulah will be taken up later stop in connection with this general subject my inspection on eighth showed deliberate violation of specifications by your local engineer in the ponding of water stop it is suggested that you give this matter careful consideration as continuation of this policy is certain to lead to delay in completion of the work which is undesirable both to your company and the Government.

On April 21, 1930, by direction of the contracting officer, the contractor was orally assigned the use of Borrow Pits C and D, located as hereinafter described.

On April 22, 1930, the contracting officer ordered the contractor to work north or south from the vicinity of Station 1998. Work north thereof was on the upper landside enlargement; south thereof on the riverside enlargement.

On April 25, 1930, the contractor, after describing his plan of operations in the vicinity of Station 1998, which disclosed his purpose to dredge to the riverside fill south of Station 1998 simultaneously with preparation of foundations and erection of toe levee on the uncompleted upper landside enlargement north thereof, requested of the contracting officer a pit on the northern bank of Lake Beulah opposite Stations 1850 to about 1925 for use on the uncompleted portion of the upper landside enlargement. The request for this pit was not granted.

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17. The contractor moved the dredge "Diesel" into Pit D April 30, 1930, by cutting a channel. Pit D was located alongside the riverside enlargement, riverward, from Station 2000 to about Station 2065, and contained material similar to that in Pit A. The contractor could not fill northward from Station 1998 at that time, April 30, 1930, due to the fact that the foundations north of Station 1976 had been fouled and not yet prepared, and there were no toe levees yet constructed for some distance north of Station 1998.

Toe levees were not used by the contractor for the first lift on the riverside enlargement, because of the physical conditions.

Old borrow pits ran alongside the site of the riverside fill, and the contractor pumped against the face of the old levee, allowing the material to run into the borrow pits until it created a "false berm" between borrow pit and levee and gave sufficient base for a toe levee which he built later on for his second lift. The first lift, a blanket fill, was made from Pit D, and operations therefrom began May 1, 1930, and ceased June 12, 1930. The dredge "Diesel" was shut down June 12, 1930, and did not resume operations until it was removed to Pit C and operated therefrom beginning October 6, 1930. The period of this delay, June 12, 1930, to October 6, 1930, is chargeable to the neglect of the contractor to proceed with the work. The contractor did no corrective work on the upper landside enlargement from about the first of May to the middle of June 1930.

From Pit D the contractor pumped 493,256 cubic yards of material for the riverside enlargement, Stations 1998–2065. Of this quantity the Government accepted 137,014 cubic yards in the fill and 5,151 cubic yards outside the prescribed limits of the fill as "false berm." The remainder, 351,091 cubic yards, remained in the old borrow pits and was not paid for by the Government. This method of dredging from Pit D to the riverside enlargement, with consequent overflow of 351,091 cubic yards into the old borrow pits, was reasonable procedure, and was not objected to by the Government. No spillways were used on this lift. The Government paid for the 5,151 cubic yards of "false

berm," on the ground that the levee was benefited thereby and that it was proper that the contractor should be paid therefor. False berm is an additional shoulder of material placed artificially alongside the levee in order to give it additional stability and foundation.

Article 1 of the contract provides that the contract shall be performed "in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof" and in Article 2 that "anything * * * shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both." Article 1 also referred to sketches for riverside and landside enlargement attached to the contract. The contract drawing in a "legend" to the left opposite a green line insignia on the drawing for "riverside" work has this note:

> Riverside enlargement to be preceded by hydraulic fill of present pits.

In this manner the contract located the riverside work and provided what should be done with the pits which the evidence shows were close to the toe of the addition to the levee.

18. On May 21, 1930, while the contractor was pumping buckshot from Pit D on the riverside enlargement, he requested of the area engineer that he obtain for use on the levee enlargement a buckshot pit of comparatively small extent about opposite Station 2000, in addition to larger pits adjoining, already condemned for use on the work.

19. The contractor removed the effluent from the levee foundations, accumulated there as hereinabove described, below Station 1935, commencing the removal June 12, 1930, and completing the same June 30, 1930, using dragline, scraper, and other dry-land equipment. The cost of removal was approximately $3,685.17. The amount removed was 44,444 cubic yards.

20. On June 14, 1930, a conference was held between representatives of both sides at the office of the Chief of Engineers, U. S. Army, in Washington, D. C., Maj. Gen. Lytle Brown, for the purpose of adjusting disputes that had arisen between them. At this conference, the Chief of

Engineers ruled that material placed by the contractor from Stations 1882 to 1935 from Pit A, and theretofore objected to by the contracting officer as material not suitable for levee construction, due to the method of transporting from Pit A and placing in the settling basins, would have to be removed by the contractor and at the contractor's expense. The preparation of foundations theretofore also objected to, was conceded by the Government representatives as acceptable.

21. On June 24, 1930, the contractor made a written request of the contracting officer for an indeterminate extension of time for performance, due to delay then being experienced on account of certain actions of the Government complained of, in the nature of interference with the contractor's mode of operation, chiefly, the limitation of settling basins and resultant deposit of muck over foundations, and enforced removal to Pit D before the upper landside fill had been completed.

The contracting officer refused the request and on June 30, 1930, so notified the contractor. From this refusal the contractor on July 30, 1930, appealed to the president of the Mississippi River Commission, who on August 16, 1930, refused to entertain the appeal on the ground that he had no authority to do so.

22. On June 24, 1930, the contractor requested of the contracting officer that he designate the exact locality of the unsuitable material from Stations 1882 to 1935 which General Brown in the conference of June 14, 1930, had ruled must come out at the contractor's expense, give directions for its disposal, and furnish information as to location of pits for the remaining work on the upper landside enlargement extending from Station 1876 to Station 1998.

July 5, 1930, the contracting officer notified the contractor that a satisfactory disposition of the unsuitable material would be on the landside in the old borrow pits not closer than five feet to the landside toe of the new enlargement, and gave the detailed extent and location of the unsuitable material between Stations 1882 and 1935, amounting approximately to 138,000 cubic yards.

July 7, 1930, the contracting officer in writing furnished the contractor with the location of borrow pits satisfactory to him for the contract work. The locations shown were severally designated borrow pits "A," "B," "C," "D," and "E." The locations of borrow pits A and D were as hereinabove indicated and had already been used. Borrow pit B was on the south bank of Lake Beulah opposite Stations 1883 to 1906, and was never used; borrow pit C was on the south bank of Lake Beulah near Station 1991; and borrow pit E ran along the western bank of Lake Vermillion opposite the lower landside enlargement site, Stations 2065 to 2190.

Pit B was substantially the pit referred to by the contracting officer in his letter to the contractor dated April 7, 1930, as possibly containing satisfactory material. Pits A, B, C, D, and E were all buckshot pits.

On July 24, 1930, the contractor stated his objections to Borrow Pits A, B, C, and D, and made no mention of Borrow Pit E.

The principal objections by the contractor were the great waste from buckshot pits required by the contracting officer's definition of unsatisfactory material, the difficulties of flotation of the dredge "Diesel," and there was an additional objection made to the use of Pit A on account of its substantial exhaustion.

On August 1, 1930, the contracting officer by letter to the contractor denied the validity of all these objections.

23. The contractor not having removed the unsuitable material directed by the Chief of Engineers to be removed on the upper landside enlargement between Stations 1882 and 1935, the contracting officer, on September 25, 1930, by letter to the contractor again ordered its removal.

The contractor, October 3, 1930, replied to this order as follows:

> Replying to your letter of September 25, 1930, relative to removal of material between Stations 1882 and 1935; also regarding our resumption of work.
>
> It is our purpose to begin pumping in material near Station 1998 within the next five (5) days; that is, as soon as pipeline can be laid. This material to be taken

from borrow pit "C" as designated by you. This work will be prosecuted toward Station 2065, with spillways 2,000′ apart.

While the above-mentioned work is being done (between Stations 1998 and 2065) we will be installing the pipeline from the new pit recently selected on the Island (approximately opposite the work between Stations 1882 and 1935), from which latter pit we propose to pump in the landside enlargement between Stations 1882 and 1935. We understand that the material in this latter pit consists of coarse sand and will require only one spillway.

It is also suggested, subject to your approval, that the removal of the 138,000 cubic yards of objectionable material (between Stations 1882 and 1935) be accomplished by washing same out with the discharge from the pump. This removal is to be done by using the booster plant for this purpose. The spillway for wasting this material to be located through the controlling levee so that this unsuitable material can be wasted into Lake Beulah.

It is understood that in using this latter borrow pit it will be necessary to strip the overburden of unsuitable material to a depth of approximately nine (9) feet; that is, until suitable sand is reached and flotation for the dredge is obtained. This latter material (stripping) to be wasted into Lake Beulah.

Hoping the above meets with your approval, we are, etc.

The pit referred to in this reply as approximately opposite work between Stations 1882 and 1935 was a sand pit, on the northern bank of Lake Beulah, and was known as Pit 2-A.

24. From Pit D the contractor moved his dredge "Diesel" to Pit C, and started pumping therefrom about October 6, 1930, into the riverside fill, over the blanket laid down by the dredging operations from Pit D. For the second operation a toe levee was used, erected atop the blanket fill, from Stations 2000 to 2020. The riverside fill was completed from Pit C.

From Pit C the contractor dredged 1,170,805 cubic yards for the riverside enlargement, of which the Government accepted 237,774 cubic yards in the fill, and 111,562 cubic yards as "false berm." The remainder came to rest in the

old borrow pits, outside the limits of the levee enlargement and "false berm," amounting to 821,469 cubic yards, and was not paid for. As stated in Finding 17, this was a reasonable procedure to which the defendant made no objection.

25. The material from Stations 1882 to 1935, objected to by defendant's officers, was so doubtful in nature as to justify its classification as unsuitable for levee construction. The contractor had pumped thereover a quantity of suitable material, and in the process of removal the suitable material necessarily had to be removed also, some small portion of it being thereafter replaced. This material, both suitable and unsuitable, was not washed out as suggested in the contractor's letter of October 3, 1930, but was removed by the contractor by the so-called dryland method, in this instance by the use in the main of draglines, the work being accomplished from September 1930 to May 1931.

The unsuitable material consisted of 138,722 cubic yards and the overlying suitable material, 38,832 cubic yards. For placement and removal of this total of 177,554 cubic yards the contractor was paid nothing. The approximate cost to him of removal was $48,332.73.

26. Pit 2-A was a sand pit, overlaid with material which was not suitable for levee construction and which had to be wasted. The contracting officer January 31, 1931, communicated with the contractor regarding this borrow pit as follows:

> There is enclosed herewith a blueprint showing pits which are designated on the west [north] bank of Lake Beulah, for use in the construction of the levee between stations 1876 and 2000 on your Beulah-Lake Vermillion contract. Material to be removed and wasted before any material from pits is used in the levee is also shown by sections on the blueprint.
>
> The wasting of this overburden involves the handling of approximately 459,000 cubic yards of material which will be paid for at contract price per cubic yard.

The contractor moved his dredge to Pit 2-A about February 7, 1931. The overburden thereof was accordingly stripped and wasted by the contractor and the remainder of the work on the upper landside enlargement completed

hydraulically with sand from Pit 2–A, including the replacement of 138,722 cubic yards removed as described in Finding 23, and the greater part of the 38,832 cubic yards of satisfactory material superimposed.

From Pit 2–A the contractor stripped and wasted an overburden of 499,836 cubic yards, for which the Government paid, and dredged into the fill 821,229 cubic yards thereunder, for which the Government also paid the contractor.

27. On May 15, 1931, the contractor communicated with the contracting officer by letter as follows:

> We expect to finish pumping from the present borrow pit (No. 2—about opposite Station 1900), about May 25th, 1931.
>
> In order to complete the landside enlargement from Station 2065 to Station 2190, it will be necessary to locate and use another pit.
>
> I am advised that explorations and borings show a pit with suitable material, located along the west [north] shore of Lake Beulah, about 5,000 feet southwards of the present pit (No. 2), that is, about opposite Station 2000, and about 1,500 feet westward of the east shore line of Lake Beulah.
>
> I am also advised that some stripping of unsuitable material will be required.
>
> You will recall that we attempted recently, with the Dredge *Houston*, to use the pit on the west side of the Mississippi River to make this landside enlargement, but after pumping some fifty to sixty thousand yards, we were compelled to discontinue this operation on account of the drift and current breaking up our pipe line.
>
> On account of the short time remaining to make the above described change, we would appreciate your prompt reply and instructions regarding above matters.
>
> We have permission from the owners to use the above-described pit.

The pit described in this communication as about opposite Station 2000 came to be designated Pit 4–C. It was a sand pit and, except for 58,602 cubic yards taken from the Mississippi River by another dredge, an operation found to be impracticable, furnished all the fill on the lower landside enlargement.

The contracting officer's representative on May 20, 1931, replied:

> The pits originally designated for this work were on the west bank of Lake Vermillion and are still available. However, should the desired new pit on the west [north] bank of Lake Beulah contain suitable material, it will be approved by this office, provided that all objectionable material be stripped from same without cost to the United States.
>
> On receipt of your agreement to the above the necessary borrow pits will be investigated and designated.

To this the contractor responded May 23, 1931, that:

> (1) The only pits which we are aware of that contain material which conforms to the contract and specifications, that is, "75% or more sand," for the landside Enlargement (Station 2065 to Station 2190), are the pits on the west [north] side of Lake Beulah, as previously suggested in our letter of May 15th.
>
> (2) Our past experience in "placing hydraulically" the material found in pits "A," "C," and "D," which material in the pits is similar to the material found along the west bank of Lake Vermillion, indicates to us that if we attempt to "place hydraulically" this Lake Vermillion material, that your office will reject 65% to 70% of same after being so placed.
>
> (3) If you know of any pits on the west side of Lake Vermillion which contain material in conformity with the contract and specifications, that is "75% or more sand," we would appreciate your designating their location.
>
> (4) For your information, we completed on May 22nd, the construction of the landside enlargement from station 1990 northward, and we are ready to proceed with the construction of the landside enlargement between station 2065 and station 2190.
>
> (5) In view of all of the above, we would respectfully request your further advice and instructions on the subject matter.

On May 29, 1931, the contracting officer replied to this, stating that: "Your letter is in error in stating that the contract and specifications require that the material for the enlargement in question contain 75% or more sand."

The contractor wired the contracting officer June 1, 1931, that he did not concur in this decision but that if satisfac-

tory he would proceed with the stripping without prejudice to his rights.

On June 2, 1931, the contracting officer wired the contractor as follows:

> Retel June first borrow pits you propose on west [north] bank Lake Beulah for lower landside enlargement stations twenty sixty five to twenty one ninety not satisfactory stop borrow pits on west bank Lake Vermillion originally designated for this section are available.

From this latter decision the contractor appealed to the Chief of Engineers June 8, 1931. The Chief of Engineers denied the appeal June 11, 1931, and ruled as follows:

> Your contention that a levee of Class C Section must contain 75 percent or more of sand is incorrect. A true statement is that if the material does contain 75 percent or more of sand the levee should be of Class C section. The prescribing of Class C Section does not carry with it the requirement of 75 percent or more of sand but guards against 75 percent or more of sand being used in the smaller sections.
>
> You must use the pits designated by the contracting officer or you must protect the United States against unsuitable material at your own expense in case pits are selected by you.

On June 12, 1931, the contractor agreed with the contracting officer to strip Borrow Pit 4–C at his own expense. The contractor thereafter stripped Borrow Pit 4–C of 627,684 cubic yards of unsuitable material and deposited the material thereby exposed, consisting of sand, in the fill of the lower landside enlargement, by the hydraulic process.

For the 626,684 cubic yards of material so stripped the contractor has not been paid. From strata thereunder the contractor pumped to the lower landside enlargement 412,942 cubic yards, which was accepted and paid for as fill, 15,572 cubic yards which was accepted and paid for as "false berm" or extra material, and 32,186 cubic yards, which was wasted and not paid for, a total of 460,700 cubic yards.

28. Had the Government placed no restriction on the length of settling basins, the contractor would have had to

use at least three, one for the upper landside enlargement, one for the riverside, and one for the lower landside. The Government placed no restriction on the length of settling basin in the lower landside enlargement.

The settling basins required by the Government, in excess of these three, were seven in number, necessitating five extra crossdikes and seven extra spillways.

The approximate cost of erection, maintenance, and demolition of the seven spillways was $3,636.20. The approximate cost of erection of the five crossdikes was $466.50, consisting of 4,665 cubic yards of material.

29. The entire contract work was completed by the plaintiff December 8, 1931, representing a delay in completion of 255 days, for which the defendant withheld from the contract price $2,550. The delay of 255 days was due to the failure of the plaintiff to prosecute the work with due diligence and is not attributable to any act or acts of the defendant. The propriety of the deduction of liquidated damages was not passed upon by the contracting officer, but was by him left to defendant's accounting officer.

30. The claims made in paragraphs XV, XVI, and XVII of the petition, with respect to increased length of pipe line, are abandoned by the plaintiff.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant for dredging, transporting, and placing material to be used in the construction of an addition to a levee along the Mississippi River. The price of the work per cubic yard placed was fixed at 35.47 cents and the contract estimate of its amount was approximately $851,280. Excluding the claims which have now been abandoned under the allegations of the petition, the plaintiff seeks to recover approximately $1,022,958.64 for additional work and expense alleged to have been wrongfully caused or required by the defendant in the course of the operations under the contract together with $2,550 deducted as liquidated damages for delay. Included in the recovery asked is an alternative claim for

work alleged to have been performed under the contract and not paid for.

As the parties do not agree upon the construction of the contract or upon the facts shown by the evidence it becomes necessary to first construe the contract and then determine what has been proved or disproved by the testimony.

The plaintiff claims that the contract was one for dredging work; the defendant insists it was for levee work. The contract provided in substance that the material should be moved by a hydraulic dredge but it was well understood that the fill which was to be made with the materials moved was to constitute the base of the addition to a levee, except where the material was used to fill old borrow pits pursuant to the contract. We think that neither party is entirely right with reference to the construction of the contract.

The contract is not as clear as it might have been made and we find it necessary to construe its provisions in the light of all of the circumstances in the case.

The specifications attached to the contract provided that—

> Alternate bids will be received for placing * * * the required yardage hydraulically in any approved manner.

The contracting officer and counsel for defendant construe the words "in any approved manner" to mean in a manner approved by the contracting officer, but we think it clear that so far as these words taken alone are concerned they can not be so construed. It is not so stated in the words quoted and they would not be so understood as applied to engineering work. The words "approved manner," when used without other limiting expressions with reference to the performance of the work, we think mean "sanctioned" or "endorsed" generally by those skilled in the business or occupation which is exercised in the performance of the work. This approval need not be unanimous as there is often a difference of opinion in such matters even among those most skilled. In such cases, however, if the practice used is sanctioned by a decided majority or by those shown to be best informed and skilled in the work it becomes established as the "approved method."

Counsel for defendant in further support of the argument that the approval of the Government engineer was required quotes the following from specification 22 of the contract, which provides—

> In the event that the contractor proposes to do the work by hydraulic methods his plan of operation shall be submitted to the contracting officer for approval.

We think that this provision of the contract was abandoned or waived. A plan of operations could not be furnished by the contractor until he received the necessary construction notes and was assigned a borrow pit or pits from which he was to dredge for the fill. No attention seems to have been paid by either party to this provision. No plan was furnished by plaintiff nor was any requested by defendant. The reason appears to be that the work was begun long before complete construction notes necessary for preparing a plan were furnished by defendant and some of the work was begun before any construction notes were available. In fact, defendant advised plaintiff that toe distances could not be given until plaintiff had started pumping and defendant had an opportunity to determine the class of material to be placed in the fill, and further that defendant could not furnish more than 500 feet of construction notes [at one time] which was too short for practical purposes and insufficient for the preparation of a plan of operations. The contracting officer, however, claimed the absolute right to pass finally upon the *method* used by plaintiff in placing the material and considered that when he determined it was "not proper" this ended the matter. In this respect he erred, but this holding will be found not material to the decision of the case as we proceed with its further consideration.

There is another provision of the contract which defendant claims was violated by plaintiff and was one of the reasons given by defendant for requiring plaintiff to remove a large quantity of material which plaintiff claims had been properly placed in accordance with the contract. Section 22 of the specifications of the contract provides—

> No earth showing a tendency to slough shall be placed in the embankment.

The meaning of the word "slough" as given in the dictionary [except where used as a medical term] is to shed or cast off. As thus used it refers to a separation of material. We are unable to apply the clause of the contract quoted above to the conditions under which hydraulic work must necessarily be carried on. The material had to be pumped and it could only be pumped when in a semi-fluid condition, and when discharged it would not only separate but actually flow. Its condition when discharged at the end of the suction pipe was such that this provision could have no application thereto. If this clause has any application, it must refer to the material which had settled and been deposited, but here another difficulty is encountered. What kind of an appearance would be presented by material "showing a *tendency* to slough" is not disclosed by the testimony. Our determination of other provisions of the contract considered later on is, however, such that a construction of this provision is of no importance.

The contract was not only for moving material but for placing it by hydraulic methods. Moreover, it was stated therein that the earth to be moved was to be used as an embankment for the construction of an addition to a levee. Placing the material in an approved hydraulic manner did not end with its discharge from the suction pipe. It is true that a hydraulic dredge draws into its pipe the material just as it comes. The material to a certain extent is disintegrated and segregated into its component parts by reason of the action of the cutters in the borrow pits and the agitation caused by pumping. (See Finding 14.) This agitation cannot be controlled but the evidence shows that as the material is discharged it is possible to substantially control the placing of it so that the suitable material will be deposited in the fill and the unsuitable material for the most part flow off. Such being the case, we think the contract required that when the material was distributed after it emerged from the discharge pipe it should be so placed by means of settling basins and control of the flowage that any considerable quantity of unsuitable material would not be deposited in one place when intended to be used as part of the base of an enlargement of the levee.

Defendant's counsel call attention to specification 39.1 wherein it is provided:

> * * * in no case shall pockets of water be permitted to remain between the center line of the levee and the outer limits of the hydraulic fill.

This provision had no reference to so-called "ponding" in the settling basins but applied to the finished work after the fill had been made complete.

We have set out our construction of the disputed provisions of the contract in order that they might be applied to the facts established by the evidence. When the plaintiff's case is analyzed, however, it will be seen that the application of the rulings made above is considerably restricted. The reason for this is that there is no substantial controversy as to the nature of the material which plaintiff placed in the fills forming part of the levee. A portion of it, which defendant required plaintiff to remove as unsatisfactory, is shown to have been unfit for levee purposes by the evidence as a whole. (See Finding 25.) The remainder complied with the contract and was accepted and paid for. The controversy for the most part arises as to whether the restrictions placed by defendant on the flow of material as it came from the discharge pipe caused unnecessary wastage and were arbitrary. In other words, the controversy so far is not whether plaintiff deposited unsuitable material in the fills, but whether defendant, by its requirements and restrictions, caused large quantities of material to be unnecessarily and unreasonably wasted so that plaintiff is entitled to recover therefor as if this material so wasted had been placed in the fills.

The evidence with reference to the alleged wastage of material is extremely indefinite and conflicting. It establishes nothing except, as we have before stated, that the deposit of material in the fills may be largely controlled by the use of settling basins, spillways, baffleboards, etc. The material which came from the discharge pipe was mixed with water in such a condition that it would flow to a greater or less extent and separate from the water as it flowed. It is a matter of common knowledge that the heavier

material in this mixture will first be precipitated; then the next in weight; and last what has been referred to in the testimony as "fines," that is, fine material consisting mostly of silt. The parties agree that silt in considerable quantities by itself is not suitable for levee purposes and it is evident that there would be more or less wastage if methods were used to prevent an undue accumulation of unsuitable material. The parties dispute as to the number of settling basins which should be used and not only as to the number of baffleboards and spillways but as to the effect thereof. The plaintiff wished to have them so arranged that as much material as possible would be deposited. The result would have been that nearly all the material which was pumped would go into the fills and this would have placed in the fill considerable quantities of unsuitable material. The defendant, through its contracting officer, insisted in some instances on restricting the length of the settling basins to 2,000 feet and also required that the baffleboards should not be used in such a manner as to prevent the continuous flow of water. In some instances, this method resulted in over half of the material pumped being wasted. This would seem to be unnecessary, but how much would be wasted when proper methods were used to prevent unsuitable material being deposited, we cannot determine. Finding 15 shows that when pumping from a certain pit if one long settling basin were used, as plaintiff desired, only 15% would be wasted, but plaintiff's method, as we have stated above, would have resulted in considerable quantities of unsuitable material being deposited in the fill. We are unable to determine just how much would have been wasted if a proper method, or an "approved" method had been used, for the reason that the evidence fails to disclose any approved method of controlling the placing of the material by settling basins, baffleboards, etc. There is nothing to show any rule or established practice in this matter and it is difficult to see how there could be for the method would be different with the different kinds of material pumped. Plaintiff itself used settling basins shorter than 2,000 feet when pumping material composed largely of sand.

The lack of evidence on this point, however, does not relieve the plaintiff of responsibility if defective material was in fact placed in the levee fills for reasons above stated and others that will be hereinafter given.

Taking up next, in their order, the several claims made by plaintiff in its petition, we find that the first claim [paragraph VI of the petition] is for 138,722 cubic yards of material moved on orders received from the contracting officer from the landside toe of the new levee prism to the old borrow pits. Claim 2 [paragraph VII of the petition] goes with No. 1, as it has the same facts as a basis and is for 30,000 cubic yards of material furnished by plaintiff from borrow pit A designated by defendant and which, under defendant's orders, was removed from the landside toe of the new levee prism to old borrow pits. This material was suitable but had been deposited above the material described in claim 1 and consequently had to be removed if the material referred to in No. 1 was taken out.

In this connection the plaintiff claims that the contract contains a direct provision that it should be paid for the removal of waste material. The provision upon which it relies is set out in paragraph 24 of the specifications and is as follows:

> *Disposition of objectionable material.*—When the borrow pits, or the ground to be occupied by the levee, contain soil which is unfit to be put into or remain under the levee, the contractor will be required to remove the same and dispose of it as directed by the contracting officer. If such material removed from the ground is wasted, the contractor will be paid for it at the contract price per cubic yard.

We think it obvious that this provision pertains only to material in the borrow pits and the ground to be occupied by the levee. In many cases the suitable material in the borrow pits was overlaid with material unfit to be put in the levee. In this event, of course, it was necessary for it to be removed before pumping the suitable material out of the borrow pits. For the removal of material so wasted the plaintiff was to be paid but this provision has no ap-

plication to unsuitable or defective matter which was placed in the fill forming part of the levee.

Defendant's engineers advised plaintiff that this material was unsatisfactory and ordered its removal. "Unsatisfactory" is not necessarily the same as unsuitable. We do not need, however, to decide whether their action determined the matter, for the evidence pertaining to this particular deposit shows it to be of defective material. (See Finding 25.) Indeed, this is scarcely disputed on the part of the plaintiff. The evidence makes it plain that it was easily distinguishable from the suitable material which plaintiff had placed above. Plaintiff seems to contend that the contract only required that it should pump the material from designated borrow pits and if, when it was discharged, defective material was placed in the fill, it was not responsible. This, we have shown above, is an error, for its responsibility did not end when the material came out of the discharge pipe. Moreover, this is definitely settled by another provision of the contract. Article VI provides:

> The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

The Government had the right under this provision to have the situation corrected and the necessary work done for such purpose and was not required to pay for the placing of this material in the fill, nor on account of its removal, unless some liability was incurred by reason of the material being used to fill the old borrow pits, a matter which will be considered later; or, unless the deposit of defective material came into existence because of unreasonable and unnecessary requirements made by defendant.

Having found that the material was in fact defective, claims 1 and 2 must be rejected for the reasons above stated, regardless of whether the method prescribed by defendant would have prevented the deposit of defective material or

whether this method would have unnecessarily restricted the deposit of proper material, and we do not pass on these questions.

Claim 3 [paragraph VIII of the petition] is based on an alleged unnecessary wastage of material pumped from pit A by reason of defendant's restrictions on the length of the settling basins to 2,000 feet, and on the use of baffleboards.

Pit A was a buckshot pit in which there was a union of fine sand, silt, and clay. In its natural state it was satisfactory levee material bound together by the clay, but when mixed with water and drawn through the suction pipe it was disintegrated and a large amount of unsuitable material which, as it lay in the pit had been bound in with more solid matter, became separated and unfit for use in the construction of the levee. If the material deposited was restricted to that which was suitable, a large amount of wastage occurred (see finding 14). This is practically conceded by plaintiff but it insists that the defendant's requirements as to settling basins, baffleboards, etc., caused an excess wastage of 139,985 cubic yards which was entirely unnecessary. It may be, as we are inclined to think, that the restrictions and requirements made by defendant were excessive but the evidence does not show the amount of wastage which would have occurred if proper methods had been used—that is, methods which would have prevented the deposit of any considerable quantity of unsuitable material. Finding 14 shows the difficulty which arose when buckshot was pumped and while the evidence in some respects is indefinite it does show, as we think, that a large amount of waste was unavoidable in properly placing this material. On this point the evidence is conflicting, in some respects on both sides we think unreasonable, and from it we are unable to make even an approximation as to the proper amount. This claim must therefore be rejected.

Claim 4 [paragraph IX of the petition] is based in part on the failure to designate additional borrow pits and defendant's order to begin placing the materials without retaining levees. We think this claim and claim 5 [paragraph X of the petition] are not proved except as they are merged in claim 6 which will next be considered.

Opinion of the Court

Claim 6 [paragraph X½ of the petition] is for filling old borrow pits on the riverside of the levee and is advanced as an alternative to claims 4 and 5, as the wastage claimed in 4 and 5 flowed into the old riverside borrow pits. This claim depends on the construction of the contract, or to state it more definitely, on the construction of a requirement placed in a sketch attached to the contract which will next be considered. The contract included specifications for levee work which were amplified by drawings and sketches attached thereto and made part thereof, and the work was required to be *strictly* in accordance with the specifications and drawings. The contract drawing had a heavy green line as an insignia for the "riverside" work and also a note as follows: "Riverside enlargement to be preceded by hydraulic fill of present pits." A large portion of the material pumped from pits C and D was wasted. Plaintiff claims that this waste occurred by reason of the restrictions on the settling basins and removal of the baffleboards under the unreasonable and improper requirements made by the defendant. But there would have been a large amount of waste in any event if only proper materials were permitted to be deposited in the fill. How much this waste would be, we do not find it necessary to determine because the wastage overflowed into the old borrow pits on the riverside of the levee and plaintiff under the contract would be entitled to recover to the extent that these borrow pits were filled thereby. It is argued on behalf of defendant that the provision of the contract last above quoted was intended to apply only in case a dry fill was made and hydraulic methods not used. But there is nothing in the evidence which would support this construction. On the contrary it would seem that there may have been no occasion for this provision if the dry fill method had been used, or at least no more occasion for it. It would seem reasonable that the defendant would not want borrow pits of a size capable of holding such a large amount of material to remain empty on the riverside and adjacent or near the toe of the enlargement of the levee and that the stability of the levee would be increased when these pits were filled with earth. The borrow pits, if empty, would be filled with water when the

river was at a high stage. But we do not base our conclusion on what has just been stated and it is not necessary that we should do so for the contract is quite plain in this respect—indeed much plainer than it is with reference to most of the matters in controversy. We think the plaintiff was required to fill the borrow pits on the riverside and if we are correct in this it was entitled to pay for the material that went into them.

It is also contended on behalf of defendant that the yardage for which it was to pay is limited by the estimates contained in the specifications plus 20%, but in Article 1 of the contract the words "more or less" follow directly after the figures stating the yardage to be moved and placed. Moreover, we think that taking the contract as a whole it was intended that the plaintiff should be paid for all work done under it. It is also said that a letter from plaintiff showed it understood that it was not to be paid for material extending beyond the toe of the levee. But in the letter plaintiff was writing about the *landside* enlargement, and we do not think defendant would be willing to have the remainder of the contract construed according to plaintiff's understanding of it. Elsewhere the defendant is insisting that the contract be constructed strictly against plaintiff.

Another provision of the contract cited on behalf of defendant plainly applies only to cost of clearing, sodding, etc., and has no application here.

This makes it necessary to determine how much material was thus disposed of. From pit C the plaintiff dredged 1,170,805 cubic yards but the Government accepted only 237,774 cubic yards in the fill and 111,562 yards as "false berm." The remainder, amounting to 821,469 cubic yards, overflowed into the old borrow pits outside of the levee enlargement and false berm. Here no claim can be made that the material was defective for the purposes for which it was used.

From pit D the contractor pumped 493,256 cubic yards of material for the riverside enlargement. Of this quantity the Government accepted 137,014 cubic yards in the fill and 5,151 cubic yards outside the prescribed limits of the fill as

"false berm." The remainder, 351,091 cubic yards, went into the old borrow pits and was not paid for by the Government. No spillways were used on this lift and the work proceeded in this manner by common consent. A "false berm" is an additional shoulder of material placed alongside a levee to give it additional stability and foundation and the Government paid for what went into the false berms on the ground that the levee was benefited thereby. The total amount placed in the old borrow pits on the riverside of the levee and not paid for was 1,172,560 cubic yards, which at the contract price amounts to $415,907,03, which plaintiff is entitled to recover.

Claim 7 [paragraph XI of the petition] is for 44,444 cubic yards of effluent materials which went through the spillway and were deposited on the foundations of the enlargement below station 1935. Plaintiff concedes that it was necessary to remove the deposit as not being suitable for foundation purposes but claims that it was caused by the defendant's interference with the length of basins, height of spillways, and erection of dikes. Here again the evidence is conflicting. No definite conclusion can be derived from it except that the claim is not supported by a preponderance of the evidence.

Claims 8 and 9 [paragraphs XII and XIII of the petition] are in the same situation. We are unable to determine from the evidence just how many settling basins would be required for doing the work in approved hydraulic manner and consequently unable to determine whether the defendant's engineer acted arbitrarily in requiring additional spillways and additional dikes or, if he ordered more than were necessary, what the proper number would have been.

Claim 10 [paragraph XIV of the petition] is for the removal of waste material from "new" borrow pit. This was done under a separate agreement made by the plaintiff that if the particular borrow pit which it wanted was designated it would remove the waste material free of cost. Plaintiff claims that this agreement was made under duress, but the evidence fails to show the necessary elements to constitute duress and the claim must be denied.

Claims 11, 12, and 13 [paragraphs XV, XVI, and XVII of the petition] have been abandoned.

Claim 14 [paragraph XVIII of the petition] for expense of delay caused by failure to make timely designation of borrow pits is not sustained by the evidence.

Claim 15 [paragraph XIX of the petition] for liquidated damages deducted in making payment is also denied as we have found that the delay was the fault of plaintiff.

In accordance with what has been said above, judgment will be rendered for the plaintiff in the sum of $415,907.03.

Whaley, *Judge;* Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

*(Defendant's motion for reconsideration of motion for new trial granted July 12, 1938. Plaintiff's motion for reconsideration of motion for new trial granted July 13, 1938.)

M. T. MOYLE, JOHN MOYLE, W. H. MOYLE, AND MRS. GRACE SKAER v. THE UNITED STATES

[No. 42045. Decided March 7, 1938]

On the Proofs

Income tax; partnership liability.—Where income tax return was filed in name of partnership, and refund claim was filed on behalf of the partnership, and in claim in abatement it was asserted that there was no partnership, contention is not sustained by the evidence, and tax is held to have been properly assessed.

Same; presumption in favor of Commissioner's assessment.—A presumption existed that the assessment of additional taxes by Commissioner was correct.

Same; statute of limitations.—The statute prohibiting refund of taxes paid under certain circumstances after running of statute of limitations was applicable to taxpayer's suit to recover taxes paid, in view of findings with reference to plea in abatement and payment of taxes.

Same.—Where on March 24, 1923, Commissioner made a jeopardy assessment against taxpayer for calendar year 1917; taxpayer filed claim for abatement of the jeopardy assessment; the claim in abatement caused a delay in collecting tax of over two years, and on December 4, 1925, abatement was rejected in part and certificate of overassessment issued and sum remaining unabated was paid and claim for refund was filed on January 30, 1930,—in these circumstances the taxpayer could receive no benefit from statute of limitations.

The Reporter's statement of the case:

Mr. W. A. Bolinger for the plaintiffs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. At the times involved herein plaintiffs or their predecessors in interest were members of a partnership designated by them and doing business as Central Oil & Gas Company. The partnership or its predecessors in interest were the lessees of 320 acres of oil and gas producing land in Butler County, State of Kansas, and in June 1916 assigned to Empire Gas & Fuel Company an undivided interest in their lease and land. Under the terms of the lease and assignment thereof Empire Gas & Fuel Company operated certain gas and oil producing facilities on the land for the assignor, Central Oil & Gas Co., and the income received by Central Oil & Gas Co. from these operations, under this lease and assignment, was divided among the copartners on a basis agreed upon among themselves. This income was the subject of the tax in controversy and it does not appear that the Central Oil & Gas Co. had any other business than what grew out of this lease.

2. On April 30, 1918, Central Oil & Gas Co. filed a return of income with the collector of internal revenue for the calendar year 1917, indicating a net taxable income of $83,091.92, and excess-profits tax of $6,647.35 thereon, which was paid May 6, 1918.

3. By letter to Central Oil & Gas Co. dated March 17, 1923, the Commissioner of Internal Revenue gave advance notice thereto of a jeopardy assessment of $56,110.95 additional for 1917, and suggested that if the taxpayer desired to have the assessment delayed and thus afford time for its consideration a waiver be submitted immediately.

On March 24, 1923, the Commissioner made a jeopardy assessment against Central Oil & Gas Co. of an additional $56,110.95 for the calendar year 1917, based on an audit of

its books, and in this assessment the Commissioner, due to his inability to determine the statutory invested capital, applied section 210 of the Revenue Act of October 3, 1917 (40 Stat. 300, 307).

On March 29, 1923, Central Oil & Gas Co. submitted the suggested waiver to the Commissioner, and it was accepted and approved by the Commissioner.

4. On May 11, 1923, and before the expiration of its waiver, Central Oil & Gas Co. filed with the collector a claim for abatement of $56,110.95, being the jeopardy assessment above described, on the ground that Central Oil & Gas Co. was not a partnership within the meaning of the excess profits tax law. This claim in abatement caused a delay in collecting the tax of over two years.

5. Before the expiration of its waiver of March 29, 1923, Central Oil & Gas Co. submitted to the Commissioner a renewal thereof expiring March 24, 1925, which was accepted and approved by the Commissioner.

6. The claim for abatement was considered by the Commissioner, and Central Oil & Gas Co. on or about December 4, 1925, was by him notified that the claim for abatement would be rejected to the extent of $21,312.60 and that certificate of overassessment would issue for $34,798.35, and certificate of overassessment was accordingly issued, based upon application of section 210 of the Revenue Act of October 3, 1917.

The sum of $21,312.60 remaining unabated was paid by Central Oil & Gas Co. February 11, 1926, together with interest thereon of $3,583.08, a total of $24,895.68.

7. On January 30, 1930, Central Oil & Gas Co. filed with the collector a claim for refund of $24,895.68 so paid, on the ground that the claim for abatement had been filed and the additional tax and interest had been paid after the expiration of the period of limitation applicable thereto.

On July 25, 1930, the Commissioner rejected the claim for refund.

The court decided that the plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a somewhat peculiar case. The plaintiffs sue as surviving partners of a partnership to recover taxes paid. The return of the taxes for the year in controversy was filed in the name of the partnership, the refund claim was filed on behalf of the partnership, and yet it is argued that there was in fact no partnership. Indeed, it is asserted, among other things, in a claim of abatement which was filed that there was no partnership. But it is obvious that this claim can not be sustained. We think what is meant is that although there was a partnership the transactions out of which the income was received [which were the subject of the tax now sought to be recovered] were not partnership transactions. Even this is not sustained by the evidence. The profits which were assessed were made largely, if not entirely, through a lease which was executed by the partnership. The presumption in any event would be that the Commissioner's assessment was correct, but if it is necessary to sustain his findings the evidence clearly has that effect and we conclude that the tax was properly assessed against the partnership.

The plaintiffs also contend that the taxes in controversy were assessed after the period of limitations had expired, but this claim likewise is not sustained by the evidence and the law. The partnership filed a plea in abatement which was submitted to the Commissioner and by him sustained in part. The findings with reference to the plea of abatement and the payment of the tax make section 611 of the revenue act of 1928 (45 Stat. 875) applicable. See *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 416–417. And under the circumstances shown by the evidence, the plaintiffs can receive no benefit from the statute of limitations. See also *Vanderlip* v. *United States*, 79 C. Cls. 489. Moreover, the plaintiffs filed a waiver of the statute of limitations which was accepted by the Commissioner in due time.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

WINIFRED MEAGHER v. THE UNITED STATES

[No. 43141. Decided March 7, 1938. Plaintiff's and defendant's motions for new trial overruled, May 31, 1938.]

On the Proofs

Negligence of Army caretaker; suit under jurisdictional act.—Where tract of land, owned, equipped, and maintained by the Government, and used as a military training ground and camp site, was used by the National Guard as a training camp, it is held that the Government was responsible for proper and safe maintenance of the camp and all structures therein; negligence of caretaker, from which the death of a visitor resulted, held to be the negligence of the Government.

The Reporter's statement of the case:

Messrs. Joseph Fairbanks and *Edward Stafford* for the plaintiff. *Mr. James I. Cuff* was on the briefs.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Albert W. Johnson* was on the briefs.

The court made special findings of fact as follows:

1. The plaintiff is the widow of Dr. John F. W. Meagher who died on August 25, 1931, as the result of injuries received at Camp Tobyhanna, Pennsylvania, on August 23, 1931.

2. On June 14, 1935, the President approved an Act of Congress entitled "An Act for the Relief of Winifred Meagher", (49 Stat. 2077) and reading as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Winifred Meagher for damages on account of the death of her husband, Doctor John F. W. Meagher, caused by and as a result of injuries sustained while a visitor at the military camp at Tobyhanna, Pennsylvania, on August 23, 1931: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court: *Provided*

further, That said suit shall be brought and commenced within six months of the date of the passage of this Act.

The plaintiff, Winifred Meagher, is the person described as claimant in the foregoing Act of Congress.

3. Dr. Meagher and plaintiff were married on January 10, 1918. At the time of his death, Dr. Meagher was fifty-one years of age and plaintiff was forty-five years of age. They had two children, a daughter, Winifred, and a son, John, who at the time of the death of their father were twelve and nine years old respectively. The family home was at 458 Clinton Avenue, Brooklyn, New York.

4. Since the death of Dr. Meagher the plaintiff has not remarried, and since August 23, 1931, she has cared for the two minor children.

5. On August 23, 1931, and for some years prior thereto, defendant was the owner of a tract of land located at Tobyhanna, Pennsylvania, known as Camp Tobyhanna. This tract of land was equipped and maintained by the defendant and used by the defendant as a military training ground and camp site and was under the jurisdiction of the Commanding General of the Third Corps Area, whose office was at Baltimore, Maryland. The equipment thereon included enclosures known as corrals in which were kept horses used in connection with the training of artillery and other forces of the national defense of the United States. One corral is involved in this case. At the entrance of this corral the defendant had caused to be erected and was maintaining a pair of concrete posts each two feet square, six feet in height above the ground and imbedded two and one-half feet in the ground, which posts together with certain wooden bars from one post to the other formed the gateway to the corral. The rest of the enclosure of the corral consisted of a wire mesh fence each end of which was imbedded in the concrete posts when they were formed and the fence was further supported at intervals by wooden posts. The concrete posts and fence were erected by the defendant in 1926 or 1927.

6. Camp Tobyhanna was designated by the War Department as a federal reservation for the use of the States for

National Guard training. Pursuant to orders issued by the Commanding Officer of the Third Corps Area, Camp Tobyhanna during the months of July and August of 1931 was used for the training of National Guard troops of the States of Virginia, Connecticut, Rhode Island, Maryland, and Pennsylvania. The National Guard units designated by the Commanding Officer occupied this camp for summer training purposes for a period of two weeks each.

The cost of equipping and maintaining Camp Tobyhanna was paid for by the defendant. The expenses incident to the field training of the National Guard forces, including the pay, food, and clothing for the members of the National Guard, were paid by defendant.

7. It was the duty of the Commanding Officer of the Third Corps Area to keep in repair and in safe condition the structures at Camp Tobyhanna. Under this officer there was a caretaker of Camp Tobyhanna, who was a civilian employee of the defendant and resided on the premises the year-round. It was his duty to report necessary repairs to his Commanding Officer; and, in case there were repairs that needed immediate attention, he had authority, without reporting, to make them or to take the necessary steps to safeguard life and property. Before the summer training began in 1931 an inspection of the premises by the defendant disclosed no defect or unsafe condition in the fence of the corral.

8. For several weeks during August 1931, Dr. Meagher and his family were at a resort hotel about ten miles from Camp Tobyhanna. During the encampment of National Guard troops every Sunday was "visitors' day," and for the entertainment of visitors there were drills, ball games, and band concerts. On Sunday, August 23, 1931, Dr. Meagher, in company with his wife, daughter, and son and some friends of his children, visited Camp Tobyhanna. Dr. Meagher, with his family and guests, drove into the camp and parked his car in an open space about fifty feet from the corral. Dr. Meagher and the children approached the corral about four o'clock in the afternoon and stood along the fence line near the concrete post on the left side of the gateway. There was nothing to indicate that there was

anything the matter with either the fence or the concrete post. While standing there for a short time observing the horses and the soldiers, the concrete post, without warning of any kind, suddenly fell over and upon Dr. Meagher, pinning him to the ground and inflicting upon him bodily injuries from which he died on August 25, 1931.

9. Dr. Meagher was rightfully on the premises at Camp Tobyhanna, and the injuries received by him were in no way the result of any negligence on his part.

10. The concrete post in question was broken off even with the ground and knocked over sometime in July 1931. No direct evidence is in the record on who or what broke the post. Members of the National Guard then in camp set the post up and braces were set against the post to make it more firm, but no braces were against the post on the Sunday of the accident. This post fell over or was knocked down several times between the time it was broken and August 23rd. There is nothing in the record as to who set it up on those occasions.

On the day of the accident, anyone standing near the post and observing it would be unable to notice any defects. That the post had been broken off and was standing in a broken condition was known to members of the National Guard more than three weeks before the accident, and for one week before the accident was also known to several non-commissioned officers and one commissioned officer of the 107th Regiment Field Artillery, Pennsylvania National Guard, which was in attendance at Camp Tobyhanna from August 15 to August 29, 1931. There is no evidence that the condition of this post was actually called to the attention of the Commanding Officer of the Third Corps Area or to the caretaker who resided on the grounds.

11. The defendant was negligent in the care of Camp Tobyhanna in that it did not maintain competent supervision and inspection of structures, including the post in question, that it had no system of reporting defects in structures coming to the attention of members of the National Guard, that it did not remove or firmly brace the broken post, and that it gave no warning to visitors of the unsafe

condition of the post. Dr. Meagher's death was the direct result of the negligence of the defendant.

12. Dr. Meagher had received his medical education at the College of Physicians and Surgeons, Columbia University, New York City. After serving his interneship, he specialized in nerve and mental diseases. He became a consulting neurologist and psychiatrist. During the World War he was commissioned Captain and then Major in the neuro-psychiatric branch of the Army Medical Corps. After the war, he engaged in private practice as a specialist. He was a frequent contributor of articles upon his specialty to well-known and leading medical journals. He was assistant editor of two medical journals and was prominent in medical associations. He was recognized as the best along his line in Brooklyn and New York.

He was an outstanding leader in his profession at the time of his death and was at the beginning of the apex of his professional career. The reasonable expectation was that his earnings would increase year by year until he reached the age of sixty-five.

13. Dr. Meagher's gross income from the practice of his profession from 1926 to and including the first eight months of 1931 was as follows:

1926	$19, 150
1927	17, 360
1928	21, 740
1929	28, 840
1930	17, 270
1931 (eight months)	16, 775

The house in which he and his family lived at the time of his death was purchased by him in 1925 for $19,500. To modernize and furnish this house cost $10,000. These sums were paid off within three years after the purchase. One floor of the house was used for the doctor's office. From 1926 to 1929 Dr. Meagher invested $20,000 in securities which at the time of his death were worth about $4,000 or $5,000. Dr. Meagher and the plaintiff had a joint bank account upon which either might draw for any purpose. The living expenses of the family were about $5,000 per year, and the doctor's professional expenses approximated about the same amount.

Dr. Meagher had no property other than that accumulated from his earnings. The plaintiff had no property or income, but she helped her husband in the care of his office, books, and engagements. Since Dr. Meagher's death the support of the two children has fallen entirely upon the plaintiff.

14. At the time of his death, Dr. Meagher's expectancy of life was 19½ years. At the same time, plaintiff's expectancy of life was 27⅔ years. Dr. Meagher possessed high professional capabilities, was frugal and temperate in his habits, and his health was excellent. He had the respect and esteem of his fellow practitioners and was advancing professionally.

Dr. Meagher was a family man and most considerate and thoughtful toward his wife and two children. They were his chief interest and concern. In all reasonable probabilities his earnings would have increased for a number of years and he would have provided liberally for plaintiff and taken generous care of his children during their minority in the way of maintenance and education.

15. In connection with the fatal injury and death of Dr. Meagher, plaintiff paid the following bills:

2 nurses at the hospital	$22.85
Rosenkrans Hospital	65.29
Undertaker, East Stroudsburg, Pa	82.15
Undertaker, Brooklyn, N. Y	608.00
Lot in Holy Cross Cemetery	500.00
Total	$1,278.29

16. Plaintiff has been damaged on account of the death of her husband, Dr. John F. W. Meagher, caused by and as a result of injuries sustained while a visitor at the military camp at Tobyhanna, Pennsylvania, on August 23, 1931, in the amount of $25,000.00.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, widow of Dr. John F. W. Meagher who died on August 25, 1931, as a result of injuries received at Camp Tobyhanna, Pennsylvania, on August 23, 1931, brings

this suit under the authority of the following special act of Congress, approved June 14, 1935 (49 Stat. 2077):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Winifred Meagher for damages on account of the death of her husband, Doctor John F. W. Meagher, caused by and as a result of injuries sustained while a visitor at the military camp at Tobyhanna, Pennsylvania, on August 23, 1931: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court: *Provided further*, That said suit shall be brought and commenced within six months of the date of the passage of this Act.

Camp Tobyhanna, on August 23, 1931, was a military reservation owned by the United States. It was maintained by the defendant as a military training ground and camp site, and was under the jurisdiction of the Commanding General of the Third Corps Area, whose office was in Baltimore, Maryland. It was designated by the War Department as a federal reservation for the use of the States for National Guard training. Pursuant to proper military orders the camp during the months of July and August 1931 was used for the training of National Guard troops of the States of Virginia, Connecticut, Rhode Island, Maryland, and Pennsylvania, designated units of such troops occupying the camp for training purposes for a period of two weeks each. On August 23, 1931, the camp was occupied and being used for training purposes by the 107th Regiment Field Artillery, Pennsylvania National Guard, who had been there since August 15, 1931.

Part of the equipment maintained by the defendant at the camp were enclosures known as corrals in which were kept horses used in connection with the training of artillery and other forces of the national defense of the United States. At the entrance of the corral particularly involved in this suit, the defendant in 1926 or 1927 had erected and was maintaining a pair of concrete posts, each two feet square, six feet in height above the ground and imbedded two and

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one-half feet in the ground, which posts, together with certain wooden bars from one post to the other, formed a gateway to the corral. One of these posts was broken off even with the ground and knocked over sometime during July 1931. There is no evidence as to how the post was broken. Members of the National Guard then in camp set the post up. This post fell over, or was knocked down, several times between the time it was first broken and August 23, 1931. The record does not disclose who set it up on these occasions.

During the encampment of National Guard troops every Sunday was designated as "visitors' day," on which day the public was invited to visit the camp. Drills, ball games, and band concerts were provided for the entertainment of visitors on these days. On Sunday, August 23, 1931, Dr. Meagher, in company with his wife, daughter, son, and some friends of his children, visited the camp. Dr. Meagher, with his family and guests, parked his car in an open space about 50 feet from the corral in question. About four o'clock in the afternoon they approached the corral and stood along the fence line near the concrete post on the left side of the gateway. There was nothing to indicate in any way that there was anything the matter with either of the concrete posts. While standing there observing the horses and the soldiers the broken concrete post, without warning of any kind, suddenly fell over on Dr. Meagher, pinning him to the ground and inflicting injuries from which he died two days later, August 25, 1931. He was rightfully on the premises of the camp as a visiting guest, and the injuries received by him were not in any way the result of any negligence on his part.

Plaintiff in the petition alleges that the death of Dr. John F. W. Meagher was due to and caused by the negligence of the defendant, its officers and employees, in that the defendant, its officers, and employees knew, or in the exercise of due and reasonable care should have known, of the unsafe, defective, and dangerous condition of the concrete pillar and took no steps to remedy the same, or to give warning to the public or to the said John F. W. Meagher of the unsafe and dangerous condition of the pillar, which it was in duty bound to do.

It is conceded that Camp Tobyhanna and all structures therein, including the broken concrete pillar which fell on Dr. Meagher, were owned by the defendant at the time of his injury. The defendant was therefore under the usual duty which the law imposes on the owner of real estate to exercise due care that structures be kept free from concealed defects dangerous to persons rightfully on the premises, or to give warning thereof. Dr. Meagher was rightfully on the premises as a visitor, at the invitation of the defendant,[1] at the time he sustained the injury resulting in his death. The defective condition of the post which caused the injury was a hidden defect, which one standing near the post at the time of the accident and observing it could not detect. Dr. Meagher himself was in the exercise of due care and although he stood near the post, did not touch it. Obviously his death was the direct result of the negligence of the one whose duty it was to exercise ordinary care and diligence to render the premises reasonably safe for his visit. Cooley's Law of Torts, Students' Edition 1907, Section 359; *Barrett* v. *Lake Ontario Beach Improvement Co.*, 174 N. Y. 310.

The defendant concedes that the death of Dr. Meagher resulted from negligence but contends that the negligence is directly chargeable to the National Guard. In the brief it is stated:

> All the negligence in this case is directly chargeable to the National Guard. Moreover, the negligence of the National Guard must be admitted. The defendant turned over to them premises absolutely free from a dangerous condition of any kind. Most likely some members of the National Guard broke the post, and certainly some of their members put in motion that chain of events which ultimately caused Doctor Meagher's death. From a point on the ground where it could do no harm and where the defendant could have seen it and taken proper means to remedy the situation, members of the National Guard picked it up and

[1] Training Memorandum No. 1, entitled "Instructions for the Conduct of Summer Training Camps in the Third Corps Area," issued by the Commander of the Third Corps Area in 1930 and continued in force for 1931, contained the statement: "A cordial welcome will be extended to all visitors at summer training camps. Ceremonies as a courtesy to visitors will be held at such times as not to interfere with schedules of instructions."

re-set it so that it looked as if nothing had ever happened to it. They continued to maintain it in that extremely dangerous condition so that to all appearances it looked as strong and substantial as it did when the defendant erected it. On these facts the plaintiff can only succeed if the negligence of the National Guard can be attributed to the Federal Government.

The contention of the defendant can be sustained only if it be held that the occupation of the camp by a succession of National Guard units, from July 1, 1931, down to the date of the accident, was exclusive and relieved the defendant of its normal obligations as owner of the premises. We do not think that this was the case. The defendant's duty in respect to the maintenance and repair of structures on the premises was not changed by reason of the occupancy of the camp by the National Guard units for training purposes. Section 9 of the National Defense Act provides in part that—

> The Quartermaster General, under the authority of the Secretary of War, shall be charged * * * with the direction of all work pertaining to the construction, maintenance, and repair of buildings, structures, and utilities other than fortifications connected with the Army;

The duty imposed on the defendant by this statute was a continuing one without reference to whether military reservations were occupied by National Guard units or other troops. Pursuant to this obligation a Colonel of the Quartermaster Corps was stationed by the defendant at Baltimore, Maryland. He was a staff officer under the Third Corps Area Commander and his duties included all quartermaster activities in the Corps Area. Under this office and subject to his orders, the defendant kept at Camp Tobyhanna the year-round a resident civilian caretaker whose duties it was at all times to report to the Corps Area quartermaster defective conditions of structures on the premises. Colonel Baskette of the Quartermaster Corps, to whom this civilian caretaker was required to report, testified as to his duties as follows:

> Q. 35. Did Bender as caretaker make any reports to you?
> A. Frequently.

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Q. 36. Oral or in writing?
A. Both.
Q. 37. During the period of the National Guard encampments or not?
A. Both.
Q. 38. Both while the National Guard troops were there and while they were not there?
A. Yes.
X Q. 121. Would the matter of seeing a pillar down have been one where he [Bender] would have had authority to go ahead and set it up?
A. If he had seen it down, he would have taken care of it; yes, sir.
X Q. 122. Was there anybody else there whose duty it was to look after matters like that besides Sgt. Bender?
A. No, sir.

It is clear from this testimony which stands uncontradicted in the record that the defendant did not relinquish its obligation as owner of the premises, to keep the structures thereon in repair, and in a reasonably safe condition, free from hidden dangers to persons rightfully on the premises. Its own quartermaster organization remained in charge of repairs throughout the coming and going of the various National Guard units. Horses and other federal property remained at the camp, much of which was used by the National Guard throughout the entire period of their training. These facts disclose a measure of control over the premises retained by the defendant utterly inconsistent with exclusive National Guard possession.

The record does not disclose the manner in which the defective concrete post in question was broken, or by whom it was broken. However, more than three weeks elapsed between the time it fell and the date of the fatal accident resulting in the death of Dr. Meagher. During that time the post fell over several times and was set up by National Guard troops or others unknown. The defendant's caretaker was present and on duty at the camp throughout this entire time. The defective and dangerous condition of the post must have been known to many people about the camp. It is a most surprising and incredible thing that the caretaker did not learn about it. Apparently, however, he did not, as he made no report concerning it to the defend-

ant, and made no effort to remedy the defect or to warn the public of the dangerous condition of the post. The conclusion is inevitable that the caretaker was guilty of negligence in the performance of his duty. By the exercise of reasonable and ordinary diligence he undoubtedly would have known the dangerous condition of the post and reported the same to his superior so that steps could have been taken to forestall the frightful accident that resulted in the death of Dr. Meagher. His negligence was the negligence of the defendant, whose agent he was. If the services of a single caretaker were insufficient to make sure of adequate supervision of the premises, it was the duty of the defendant to provide more men for that purpose.

We have found as a fact (Finding 11) that Dr. Meagher's death was the direct result of the negligence of the defendant, and that plaintiff by reason of his death was damaged in the amount of $25,000.00 (Finding 16). Plaintiff is therefore entitled to recover the sum of $25,000.00 and judgment in that amount is hereby awarded.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THE RUST ENGINEERING CO. v. THE UNITED STATES

[No. 42100. Decided March 7, 1938]

On the Proofs

Government contract; construction of provisions distinguished from dispute as to facts.—Where plaintiff's claim was denied upon the construction of the contract rather than upon the facts, the court has jurisdiction and no appeal to head of department was necessary.

Same; additional cost due to delays because of conditions.—Where extra costs were incurred by contractor due to unforseen and unknown conditions encountered in excavating and constructing foundations for building, the changes thereby made necessary were not reasonable changes contemplated in the contract, and contractor is entitled to recover, but recovery must be limited to the actual costs incurred without profit.

Same; changes in material required.—Where the contract called for use of a cream colored glazed vitrified tile, of a kind known to the trade, and contracting officer arbitrarily demanded and required that the contractor furnish a different and more expensive tile, he obligated the defendant to pay the excess cost of the special tile plus a reasonable profit; such action constituting a change in the contract which required an equitable adjustment in the price, and was not a dispute concerning a question of fact.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff.

Mr. Bynum E. Hinton and *King & King* were on the brief.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiff seeks to recover $30,342.43 under a contract with the defendant for the construction of an extension to the Government Printing Office at Washington, D. C. The total claimed is made up of extra costs incurred by plaintiff in performing the work required by defendant, in addition to the costs contemplated by the contract, which extra costs, it is alleged, would not have been necessary and would not have been incurred except (1) for delay in beginning the structural steel work caused by unforeseen conditions encountered materially different from the conditions contemplated and specified in the drawings, specifications, and contract; and (2) in being required by the contracting officer to furnish a special tile which was different and more expensive than the tile in respect to which plaintiff made its bid and different from that contemplated and required by the contract, specifications, and drawings.

With reference to the first item, counsel for defendant contend that these extra costs were incidental damages arising as a consequence of delay due to extra work for which plaintiff was compensated and may not, therefore, be recovered. It is also contended that suit to recover these extra costs cannot be maintained for the reason that when payment was refused plaintiff did not appeal to the head of the department under art. 15 of the contract. As to the second item, with reference to the excess cost of the tile

over the cost of the cream colored glazed tile on the market and generally known to the trade at the time the contract was entered into, it is contended that plaintiff did not exhaust its remedy under the contract by an appeal to the head of the Department concerned and that the court is therefore without jurisdiction to entertain the suit with respect to this or the preceding item.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Delaware corporation with principal office at Pittsburgh, Pennsylvania. In response to invitations for bids by the defendant, issued September 10, 1928, plaintiff duly filed its written bid with the defendant October 15, 1928, for the construction of an extension to the United States Government Printing Office, at Washington, D. C., in accordance with certain drawings and specifications prepared by the defendant March 2 and approved April 20, 1928. Plaintiff's bid was accepted November 9, 1928, and plaintiff and the defendant entered into a formal written contract, based on the drawings and specifications abovementioned, on the same date. The contract, specifications and drawings are in evidence as plaintiff's exhibits 1, 5, and 6A to 6TT respectively, and are made a part of this finding by reference.

2. Art. 3 of the contract provided that the contracting officer might make changes within the general scope of the drawings and specifications and that an equitable adjustment should be made as to any increase or decrease in the amount due under the contract by reason of such changes, and that the time for performance of the work should likewise be adjusted. This article contemplated only reasonable changes within the general scope of the drawings and specifications, but, even as to such changes, the contract provided for equitable adjustment and payment of the increase in costs directly resulting therefrom. Art. 4 of the contract provided as follows:

"*Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions

at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or as indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

Art. 15 provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer, who was Carl T. Schuneman, Assistant Secretary of the Treasury, or his authorized representative, subject to written appeal by the contractor to the head of the department concerned, whose decision should be final and conclusive upon the parties *as to such questions of fact*. Plaintiff at all times diligently proceeded with the contract work as directed.

3. Plaintiff claims and seeks to recover the following amounts for the reasons mentioned: (1) $14,936.83, representing extra costs actually incurred for holding on cars, unloading, hauling, and storing structural steel, rental on equipment, and increase in the wages of structural steel workmen, by reason of delays arising under Art. 4 and caused by subsoil conditions encountered in the early prosecution of the work materially different from that shown on the drawings. In addition to these costs a 10 percent profit thereon of $1,493.68 is claimed (finding 8); (2) $531.07, extra cost actually incurred for demurrage, storage, hauling, and other charges on window sashes and frames by reason of the delays caused by subsoil conditions as mentioned in (1) above, and on which a 10 percent profit of $53.11 is also claimed (finding 8); and (3) $13,327.74, representing the excess cost, including reasonable overhead and a 10 percent profit, in being required to furnish wainscot tile different and more expensive than the tile described in and contemplated by the specifications and drawings (finding 11).

4. In constructing the extension provided for in the contract, specifications, and drawings, it was necessary for plaintiff first to wreck and remove some old buildings, then to make general excavation, and, finally, to excavate for and place the concrete footings for the walls and piers of the building. Structural steel was to be erected upon the footings and it was necessary that the footings be completed before the structural steel could be erected and before any work could be performed on the main structure. Plaintiff arranged for the necessary labor and delivery of the structural steel and other necessary material so that the work could rapidly proceed upon the completion of the necessary excavation and construction of the foundation as called for by the contract.

5. The drawings showed and specified the depth to which the excavations for the footings were to extend. Upon reaching the depth indicated for the first group of footings, plaintiff found subsoil conditions which it deemed insufficient foundation upon which to place the footings. It called this to the attention of the defendant, and the defendant made an investigation. Defendant determined that excavations for this group of footings should be made deeper and, accordingly, directed plaintiff to make a test pit and followed this by directing plaintiff to make core borings in the test pit. After this had been done plaintiff was ordered by the defendant to extend the excavation for the footings to the depth indicated by the test pit and core borings. Plainiff did so extend the excavation as ordered and constructed the footings in such excavation. Similar conditions were found throughout most of the foundation work and the procedure as to a test pit and core borings was often repeated by direction of the defendant. The defendant required plaintiff to make excavation for sixty-four footings deeper than shown on the original drawings. All of this resulted in greatly delaying the time for commencement of the erection of the structural steel and the installation of the steel window sashes and also resulted in excess costs to plaintiff in the amounts mentioned in (1) and (2) of finding 3, without fault on its part, which

extra costs would not otherwise have been necessary, or incurred.

6. Between January 25 and April 30, 1929, and after the enlarged footings made necessary by the changed conditions had been completed, defendant issued twenty-eight change orders due to unsatisfactory subsoil conditions encountered in the excavation work. The additional price named in such change orders and paid covered only the additional cost of the excavation work and materials made necessary by the enlarged footings and included nothing for the additional and extra costs caused by and directly resulting from the delay for which plaintiff was in no wise responsible.

7. February 6, 1929, plaintiff wrote the defendant requesting an extension of time in the contract period because of the unforeseen conditions encountered and the extra work required in the foundation excavations, the exact amount to be determined upon conclusion of the foundation work. It was agreed that the matter of extending the contract time for completion of the entire work would be determined later. March 22, 1929, shortly after the additional excavation work commenced, and long before it was completed, plaintiff made separate claim for the extra costs being incurred for storing and handling materials made necessary by the delays, and frequently, thereafter, plaintiff advised defendant of its claim for such extra costs as were incurred because of said delays, and also advised defendant that the extent of the delay in beginning the structural steel work and the extra cost with reference to the storing and handling of materials could not be determined until after the foundation work was completed. It was understood between the parties that plaintiff's claim for these increased costs, because of the delays, would be considered later.

Plaintiff was actually delayed ninety-nine days in beginning its structural steel and other work on the building because of the additional excavation work occasioned by the unforeseen conditions encountered. However, the extra costs for hauling, storing, and rehandling of materials and rental of equipment covered only a period of ninety days. About the time the foundation work was completed plaintiff requested an extension of the contract time of ninety-

seven days, the contracting officer extended the contract time for completion of the entire work called for by the contract for a period of seventy-one days, which extension of seventy-one days completely relieved plaintiff of all liability for any liquidated damages. No appeal was taken from the action of the contracting officer in allowing seventy-one days' extension of time and no appeal from that action was necessary for the reason that plaintiff completed the entire work of constructing the building as called for by the contract within the contract time as extended by the seventy-one days. Neither was there any controversy between the plaintiff and the defendant when the defendant made the allowance of additional compensation to cover the additional costs of the work and materials made necessary by the enlarged footings and there is no controversy here, either with reference to these additional allowances or the liquidated damages. No liquidated damages were claimed or assessed.

8. December 6, 1928, plaintiff entered into a contract with the Lehigh Structural Steel Company for the manufacture, fabrication, and erection of the structural steel in the building. Had it not been for the delays caused by the subsoil conditions heretofore referred to, some of the structural steel would have been needed for the erection of the building by January 15, 1929. This contract provided that deliveries and erection of the structural steel at the site of the work should begin January 15, 1929. Before the excavation difficulties had been encountered or were known to plaintiff, the manufacture and fabrication of the structural steel had begun in order that it might be delivered at the site of the work at the time needed. When the excavation difficulties were discovered, the program of manufacture and fabrication of the structural steel had so far progressed that it would have been a greater loss to stop such process than to complete it and store the steel. Therefore the manufacture and fabrication of the steel was completed by the Lehigh Structural Steel Company at its plant away from Washington and part of such fabricated steel was stored at its plant and the remainder thereof was shipped to Washington, where it was necessary to unload the steel from the cars,

store it, and then take it to the site of the building when the foundations were completed. Had it not been for the excavation difficulties encountered, it would not have been necessary to store or rehandle the structural steel and the erection of steel could have been started on January 15, 1929, and would have been completed before April 1, 1929. Because of the delays the erection of steel could not be started until April 24, 1929. There was, after the contract was signed, an increase in the wages of structural steel workmen, effective as of April 1, 1929, from $1.50 to $1.65 per hour. Had it not been for the delays heretofore referred to, the erection of steel would have been completed before April 1, 1929. Plaintiff was required to pay the increased wages for all the structural steel erection work. The additional costs to plaintiff, including reasonable overhead and profit for 71 days and for 90 days in the storing, handling, and erection of the structural steel, were as follows:

	71 days	90 days
Storage	$3,403.81	$4,290.00
Extra handling	352.34	352.34
Wage increase	3,926.21	3,926.21
Equipment rental	3,448.54	4,420.50
	11,130.94	12,988.55
Reasonable overhead computed on direct labor costs	1,669.64	1,948.28
	12,800.58	14,936.83
10% profit	1,280.06	1,493.68
Total	14,080.64	16,430.51

9. November 22, 1928, plaintiff entered into a contract with the Truscon Steel Company to furnish, at the site of the work, and install the steel window sashes for the building. In order to have the steel window sashes at the site of the work when needed, the Truscon Steel Company at once, and before the foundation difficulties were known to plaintiff, began the manufacture and fabrication of the same. After the manufacture and fabrication of the steel window sashes were started, it was less expensive to store the same than to stop the manufacture and fabrication

thereof. Because of the delays caused by the foundation difficulties, the steel window sashes could not be installed in the building when they arrived in Washington and it was necessary to store them until the building was far enough completed to install them. The additional cost, including reasonable overhead, to plaintiff for storing and rehandling of the window sashes, which would not have been incurred but for the delays caused by foundation difficulties, was $531.07. If there should be added a profit of 10 percent the total allowable, because of the conditions mentioned, would be $584.18.

10. September 9, 1929, plaintiff submitted to defendant its claim for extra costs incurred by reason of the facts disclosed in finding 8 and its claims based upon the facts disclosed in finding 9. These claims were considered by a board of officials in the Treasury Department, of which board the contracting officer was not a member. This board decided that since the Comptroller General had ruled that only claims for materials and labor forming a part of the completed structure could be allowed and claims for damages, because of delays, could not be allowed, plaintiff's claims herein could not be allowed by the board. A letter based upon this action by the board was prepared by a member thereof who had it signed by the Assistant Secretary of the Treasury. This letter, so far as material here, was as follows: "Items 5 and 6, covering the claims of your subcontractors, the Truscon Steel Company and the Lehigh Structural Steel Company, in amounts $523.61 and $15,-873.45, respectively, are rejected as they are in the nature of damages claimed by your sub-contractors on account of delayed delivery of materials manufactured by them, this delay in turn being due to delay in the normal progress of the project on account of the additional foundation work, and as these two items constitute neither labor nor materials that enter into the construction of the foundations, the additional compensation for them is not approved as within the provisions of your contract. However, you are privileged to accept your final voucher under protest and submit a claim for items 5 and 6 to the Comptroller General, if you so desire." There was then no dispute between the

parties, and there is none now, as to the facts with reference to the circumstances under which these extra expenses were incurred, or as to the amounts or the reasons therefor. No appeal was taken by plaintiff from the action of this board, as set forth in the letter prepared by the board and signed by the Assistant Secretary of the Treasury. As suggested by the board, plaintiff thereafter submitted these claims to the Comptroller General, who refused to pay them. In the final vouchers plaintiff reserved the right to further prosecute these claims. No part of the claims has ever been paid.

11. The contract specifications and drawings provided that wainscot tile should be used in certain portions of the building. Paragraph 502 of the specifications provided that "Wainscot tile shall be a smooth faced vitrified tile with a uniformly glazed finish. The tile face shall be of the color and sizes required by the drawings." The drawing, plaintiff's exhibit 6–G, provided that this wainscot tile should be "cream color glazed tile." This drawing and the specifications, made and prepared March 2, 1928, were checked and approved April 20, 1928. The specifications also provided that plaintiff submit samples of wainscot tile to the defendant for approval. January 17, 1929, plaintiff submitted to the defendant for approval samples of tile. The samples submitted were vitrified glazed tile and were known to the trade as cream color. Defendant advised that the tiles were satisfactory as to glaze but were not of the color desired. Defendant advised plaintiff that it could get the tile of desired color from two other companies, which were named. Plaintiff then submitted samples of the tile manufactured by these companies but defendant rejected them on account of the color. On April 10, 1929, defendant advised plaintiff that there was on file in the office of the Supervising Architect a sample of a tile made by the Clay Products Company of Brazil, Indiana, which had the desired color and if plaintiff would submit a sample of that tile it would be approved. The sample of tile on file in the Supervising Architect's office, referred to in the preceding sentence, was delivered to the office of the Supervising Architect on March 19, 1929, after the contract was entered

into. Plaintiff did not know of it until after the contract was made. Such tile was not advertised in generally used trade journals or known to the trade until sometime in 1929. This tile was marketed by that company under the trade name of "Cream Gloss Arketex." The samples of tile that plaintiff had submitted to defendant were, at the time bids were received, known to the trade and advertised by the manufacturers as cream color. The Arketex tile cost more to produce and to lay. Considerable correspondence was exchanged between plaintiff and defendant and a number of conferences were held on the tile controversy. Plaintiff did submit a sample of the Arketex tile and offered to furnish it for the additional sum of $31,478.86. Although the excess cost of the "Arketex" tile over the tile generally known to the trade as cream color vitrified glazed tile, which plaintiff submitted and endeavored to have accepted, was not denied, the Assistant Secretary of the Treasury demanded that plaintiff furnish the "Arketex" tile and stated that plaintiff would be held strictly accountable for delays. Thereupon plaintiff advised the Assistant Secretary of the Treasury in writing that it was arranging to supply a tile similar to "Cream Gloss Arketex," but asserted that it was entitled to additional compensation for such tile and that it appealed from the denial of its claim for such additional compensation; thereupon the Assistant Secretary of the Treasury, who was the contracting officer, advised plaintiff in writing that such claim was not entitled to further consideration. Plaintiff later reduced its proposal to furnish the "Arketex" tile to $20,220.41 additional compensation, and this was rejected by the Acting Supervising Architect of the Treasury and plaintiff protested in writing, both to the Acting Supervising Architect and the Assistant Secretary of the Treasury. Plaintiff arranged with the National Fireproofing Company to attempt the manufacture of a special tile similar to the "Arketex" tile insisted upon by the contracting officer and submitted samples of the tile produced by this company, which were approved by the defendant. This tile was furnished as required by the defendant and was used in the building. The actual cost to plaintiff of furnishing and laying this tile, including a

reasonable allowance for overhead and profit, was $13,327.74 more than the actual cost of furnishing and laying the cream color glazed vitrified tile generally advertised and known to the trade at the time the contract was entered into, as will be hereinafter more fully stated. This tile, however, cost less than the tile known as "Cream Gloss Arketex."

Prior to the time bids were called for, made, and considered, and prior to the time the contract was executed, the only glazed vitrified tile known to the building trade was a salt-glazed tile which was produced by applying salt to the fire during the process of burning the tile. This glazed vitrified tile was known in the trade as "cream color."

The "Arketex" tile, after it was placed on the market, long after the drawings and specifications under the contract in suit were made and approved and after the contract in question was executed, was known to the trade as "slip-faced" or "enameled title." Its manufacture required two processes to produce, while the tile known to the trade as glazed vitrified tile at the time bids were received required only one process. The "Arketex" tile was first dried and then a preparation consisting of a secret formula was sprayed on the tile to give it the desired color; following this, the tile was again burned and the glaze was produced by adding salt to the fire. The "Arketex" tile, prior to the bid and contract, was not advertised in any trade publication and neither plaintiff nor its subcontractor knew of its existence. This "Arketex" tile, after a period of experimentation, was first produced by Clay Products Company in the latter part of 1927. Sweet's Catalogue is the standard catalogue used and relied upon by the building trade to ascertain the products available and the sellers of such products. This "Arketex" tile was not advertised in the 1928 catalogue and its existence was not known to the contracting officer or to plaintiff at the time the contract was made. The "Cream Color Arketex" tile was advertised in the 1929 catalogue which did not come out and was not available until sometime after the contract in question was executed.

12. The controversy between plaintiff and the Treasury Department as to whether plaintiff was entitled upon its claim and under the facts as hereinbefore set forth, about which there was no controversy, to additional compensation for furnishing the tile demanded by defendant was brought to a close by a letter signed "By direction of the Secretary of the Treasury, F. R. Birgfield, Chief Clerk of the Treasury Department," which letter, so far as material here, was as follows:

> The tile which is being furnished does not, in the opinion of the Department, differ from that required under the terms of the contract, consequently, the Department is unable to entertain your proposal for $20,-220.41 additional.
>
> You will understand, of course, that if you are dissatisfied with this decision you are at liberty to receipt the voucher in final payment under protest, and to file your claim with the Comptroller General for the amount you consider due you. It is hardly necessary to say that such action on your part will not in any way affect your standing before the Department as a contractor, and will give you an opportunity to have the matter considered both as to the facts and the law governing the matter.

No further appeal was made by plaintiff, except that it did present its claim to the Comptroller General who denied it. In the final voucher plaintiff reserved the right to further prosecute this claim. No part of the claim has been paid.

The court decided that the plaintiff was entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

The contention of counsel for defendant that the court is without jurisdiction to entertain this suit because plaintiff did not appeal from the decisions of the contracting officer refusing to pay the items herein sued for cannot be sustained. Under Art. 15 of the contract only decisions *as to questions of fact* by the contracting officer and the head of the department concerned, if an appeal was taken, were to be final and conclusive upon the parties. No appeal

was required from any decision of the contracting officer, except as to questions of fact. In this case the record shows that there was no dispute between the parties as to the facts under which the plaintiff's claims arose and upon which they were based. Neither are those facts denied here. Payment of the extra costs making up the first item of plaintiff's claim, which represented the actual additional cost, including overhead, for rehandling and storing materials and an increase in the wages of the structural steel workers, was denied by a board of officials of the Treasury Department, of which board the contracting officer was not a member, solely on the ground that a ruling of the Comptroller General, by which the board considered itself bound, prohibited the payment of these extra expenses. The board therefore concluded that as the extra expenses making up this item did not constitute either labor or materials entering into the construction of the foundations they could not be paid for under the contract. It will be seen, therefore, that this item of plaintiff's claim was denied upon the construction of the contract rather than upon the facts. It is clear that the court is not deprived of jurisdiction to consider the claim. Appeals were necessary under the contract only on disputes concerning questions of fact, and there was here no controversy as to the facts. The board, even if its action could be considered as a decision by the contracting officer within the meaning of the contract, made no findings of fact. There was, therefore, nothing from which an appeal was required to be taken.

Upon the facts disclosed by the record, the same conclusion is necessary under the second item with reference to the additional cost incurred and paid for purchasing and laying the tile which defendant compelled plaintiff to furnish.

As to the question concerning the tile, there was no dispute as to the actual facts. The contracting officer simply arbitrarily refused to consider the claim for the additional costs. Plaintiff did appeal from this action of the contracting officer and in a letter signed by the Chief Clerk of the Treasury Department, "By direction of the Secretary of the Treasury," the claim for this extra cost was disposed

Opinion of the Court

of on the ground that the contract required that the plaintiff furnish the tile demanded. There was no finding of fact and the facts upon which plaintiff based its claim were not denied.

On the merits it seems clear that plaintiff is entitled to recover the extra costs directly attributable to the delays in beginning the structural steel work because of the unknown and unforeseen conditions encountered in excavating for and constructing the foundation for the building and for the additional cost incurred in being required to furnish glazed vitrified tile which was more expensive than the cream color glazed tile known to the trade at the time the contract was made, and more expensive than the tile which, it seems clear, was contemplated by the parties to the contract.

The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. On the facts disclosed plaintiff is entitled to recover on this item. But its recovery must be limited to the actual extra costs incurred without profit. Profits are not allowable upon damages sustained by reason of delays caused by the defendant and occasioned by unforeseen conditions encountered during the prosecution of the work, unless the contract so provides. The matter of the allowance of a profit based on extra costs was an item properly to be considered in determining the additional compensation to which a contractor is entitled for extra expense and materials required to perform the work called for in change orders. It must be presumed that in the equitable adjustment under Art. 4 of the contract, the additional compensation allowed and paid to plaintiff for the extra work and materials made necessary by reason of the additional excavation and enlarged footings included a reasonable profit.

The defense that incidental damages resulting from delays which are not unreasonable and which are caused by reasonable changes within the scope of the drawings and specifications has no application here. The cases of *McCord* v. *United States*, 9 C. Cls. 155; *Moran Brothers Co.* v. *United States*, 61 C. Cls. 73, 103; and *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 523, 525, are clearly distinguishable upon the facts involved and the contract provisions which were there being considered. The decisions are uniform that a contractor may recover damages and extra costs directly attributable to and occasioned by delays caused by the defendant by reason of conditions encountered materially differing from those specified and contemplated by the drawings and specifications. The present claim comes within this rule.

With reference to the second item of the claim presented in this case, we are of opinion that the defendant was without authority under the contract to require plaintiff to furnish and lay tile which was more expensive than the cream color vitrified glazed tile generally known to the building trade and to the plaintiff and the defendant at the time the contract was made. Clearly the contract cannot be construed as requiring plaintiff to furnish and lay a special tile not theretofore known to the trade which was manufactured by a secret process, or a similar tile necessary to be especially manufactured. The contract, instead of providing that the tile to be furnished should be such tile as the contracting officer might demand when the time came to lay the tile, stated that plaintiff was to furnish a cream color glazed vitrified tile. At the time the contract was made a cream color glazed vitrified tile was being manufactured and was generally advertised and known to the building trade. It was upon this tile that plaintiff made its bid. When, therefore, the contracting officer arbitrarily demanded and required plaintiff to furnish a different and more expensive tile than that generally advertised and known to the parties at the time the contract was made, he obligated the defendant to pay the excess cost of the special tile demanded plus a reasonable profit. Such action, which was evidenced in writing, constituted a change in the contract which required

an equitable adjustment in the contract price by reason of the increased cost. The actual additional cost, including a reasonable profit, of $13,327.74 which plaintiff was required to pay for the tile demanded is not denied by the defendant, and the defense to a recovery on this item is based solely upon the contention that the court is without jurisdiction to award plaintiff this additional compensation because the contracting officer refused the claim and plaintiff took no appeal from that action. As disclosed in the findings, this was not a dispute concerning a question of fact but the controversy involved a construction of the contract and presented the question whether, under the provisions in the drawings and specifications relating to cream color glazed vitrified tile, plaintiff should be required to furnish a tile which was more expensive than the tile advertised and known to the trade and to the parties at the time the contract was made. After the contract was entered into the Acting Supervising Architect of the Treasury received a sample of a tile manufactured under a secret process which was later, during 1929, advertised and known as "cream gloss Arketex" tile, in the manufacture of which two processes were required. This tile, instead of being known and advertised as cream color vitrified glazed tile, was known to the trade as "slip-face" or "enamelled tile." In these circumstances we think it is clear that plaintiff was and is entitled to additional compensation for furnishing and laying this more expensive tile, together with a reasonable profit upon such additional cost.

Even if an appeal was necessary from the arbitrary action of the contracting officer, the facts disclose that such an appeal was taken and the claim was later rejected by direction of the Secretary of the Treasury on the sole ground that the contract required plaintiff to furnish the tile demanded.

Judgment will be entered in favor of plaintiff for $28,795.64. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

AMBURSEN DAM COMPANY v. THE UNITED STATES

[No. 42235. Decided March 7, 1938]

On the Proofs

Government contract; construction of dam.—1. Where, in construction of the Stony Gorge Dam, there was a substitution of cut-off blocks for the cut-off wall provided for in the original specifications, a material change was made in both the character and the cost of the work, this was not "a reasonable change" within the meaning of the specifications, and the plaintiff is entitled to recover.

Same.—2. Where the original plans and specifications provided that the buttresses should be on a concrete footing, and that the footing should be poured into a trench in the solid rock, no form work being required, and changes in these plans were made, requiring form work to be used, and the concrete required to be used was buttress concrete instead of buttress footing concrete, plaintiff is entitled to recover for the increased cost.

Same.—3. Where certain changes were made in the location of a conduit, it is held that the evidence is not sufficient to support a finding that the plaintiff is entitled to recover in excess of the additional amount already received for the extra work required.

Same.—4. Where plaintiff under the contract was obligated for the "cost of furnishing all labor and materials" used in certain construction work, for which plaintiff made a lump sum bid, it is held that plaintiff is not entitled to recover for materials used which were not removed, nor for materials furnished by defendant.

Same.—5. Where extra work, which is clearly within the meaning of the specifications, was ordered by the engineer in charge, and performed, plaintiff is held to be entitled to recover.

Same.—6. Where under the contract the plaintiff was required to transport the cement, furnished by the Government, for the work, and it was discovered that excess cement had been used, which fact was admitted by the Government, it is held that plaintiff is entitled to recover the total excess cost based on the number of sacks used.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *King & King* were on the briefs.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Albert W. Johnson* was on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is now and ever since July 1, 1926, has been a California corporation, with its principal office and place of business in New York City.

2. July 6, 1926, defendant invited bids to be filed on or before August 18, 1926, for the construction of a dam, known as the Stony Gorge Dam, across Stony Creek for the Orland irrigation project about 8 miles west of Fruto, California. Prior to advertising for bids defendant made an investigation of the site for the proposed dam to determine its suitability therefor, and to decide on the type of dam to be constructed. In making this investigation core-drill test holes were drilled in the creek bottom and test pits were made in the locations for the dam abutments where solid rock was not exposed. The results of these investigations were made available to bidders, though the proposal for bids stated that "The accuracy of the interpretation of the facts disclosed by borings or other preliminary investigations is not guaranteed."

Plaintiff also inspected the site for the proposed dam and examined the specifications and drawings furnished to it by defendant. August 18, 1926, plaintiff submitted its bid, which was accepted by defendant, and pursuant thereto a contract for the construction of the dam was entered into between plaintiff and defendant dated October 2, 1926. A true copy of the invitation for bids, including the specifications and drawings, and the contract were introduced in evidence as Plaintiff's Exhibit 1 and are made a part hereof by reference.

3. In general the contract provided that the materials entering into the construction of the dam, including cement and structural and reinforcing steel, would be furnished by the defendant and that the labor thereon would be performed by the plaintiff. Except for one item denominated the "Diversion and care of Stony Creek during construction and unwatering foundations," for which the contract provided a lump sum payment of $100, unit prices were set out

in the contract for 41 items named therein. Quantities were given for each of the several items named in the contract, though it was stated in the specifications that such quantities were only approximations for comparing bids. Included among the items were three for excavation, one for excavating 6,000 cubic yards of earth and loose rock at $2.00 per cubic yard, another for excavating 11,500 cubic yards of solid rock in all cut-off and buttress-footing trenches, at $8.00 per cubic yard, and another for excavating 1,300 cubic yards of solid rock for outlet works in spillway bucket and stream-bed protection, at $8.00 per cubic yard.

4. The concrete to be placed in the dam appeared under 14 different classifications with a unit price for each item. The unit prices as bid by plaintiff varied from $6.00 per cubic yard for "upstream and downstream cut-offs and buttress footings" to $20.00 for "24-inch circular conduit from 10-inch outlet valve," and the estimated quantities shown varied from 70 cubic yards for "trash rack structure floors" and 100 cubic yards for "24-inch circular conduit" to 23,500 cubic yards for "buttresses including tongues and corbels." The total estimated quantity of concrete was 37,530 cubic yards. The major consideration in bidding on concrete work is, and that which caused a variation in the amount bid by plaintiff on the various items involved herein was, the extent and character of forms required for the various classes of work to be performed.

The contract provided that "Forms to confine the concrete and shape it to the required lines shall be used wherever necessary. * * * All forms to be repeatedly used shall be oiled each time before being used, with suitable, nonstaining oil satisfactory to the engineer. * * * Wooden forms to be used once, where not oiled, shall be wetted thoroughly just before placing concrete, * * *. The contractor shall furnish all material, labor, and equipment for the forms and their handling, and all the cost thereof shall be included in the unit prices bid in the schedule for the concrete on which the forms are used."

5. The structure provided for in the specifications and drawings is what is known to the engineering profession as

an Ambursen type of dam, and plaintiff is the owner of certain letters patent covering the design of this type of dam. This type of dam consists of a series of vertical piers or buttresses built parallel to the flow of the stream with their upstream sides or edges reclined downstream at an angle of about 45 degrees. Shoulders or haunches are constructed upon the sloping upstream edge of these buttresses, and the upstream face slab, which is the water barrier, rests upon these shoulders and buttresses, thus utilizing the weight of the superimposed reservoir water to assist in holding the dam in place upon its foundations. Underneath the face slab the dam is hollow except for the buttresses extending crosswise of the axis of the dam and parallel to the streambed and the struts which extend crosswise between the buttresses bracing the same. The lower portion of the buttresses along the riverbed extends lengthwise for varying distances parallel to the flow of the stream, while the crest of the dam comes practically to a point. The height of each buttress depends upon the elevation of the rock under it, each buttress being high enough to extend from such rock to the crest of the dam. The width or thickness of each buttress is tapered by set-offs at the various elevations or lift lines 12 feet apart vertically. All buttresses are of the same thickness at the same elevation. At the upstream edge the face slab was to be connected with the portion of the dam structure embedded below the surface of the streambed or ground to prevent seepage underneath the dam.

6. The site of the dam is in an area of California which is subject to earthquakes and movements of the earth's surface. The surface material at the site is earth and loose rock which is underlain with clay shale, sandstone, and pebble and bowlder conglomerate. A major fault line and certain secondary faults pass through the site and the foundation material is shattered in places. Due to the varying nature of the foundation material its exact condition was not fully disclosed by the test borings and was not finally shown until the completion of the excavations. In order to secure a strong and satisfactory structure, one of the requirements of the contract, drawings and specifications was that the foundations should be located in solid rock. As will hereinafter appear, foundation rock of the character desired was

found but at greater depths than had been expected by both plaintiff and defendant with the result that the quantity of excavation found necessary and paid for was 38,617 cubic yards instead of the estimated quantity of 18,800 cubic yards.

7. Excavation work for the dam was commenced by plaintiff in November 1926, and was performed by subcontractors. As the excavation for the foundations progressed it was soon disclosed that the material encountered was different in some respects from what was reasonably to be expected from the borings and test pits which had been made by the defendant when the original specifications, plans, and drawings were prepared, and that much of the material encountered was unsuitable for foundation purposes. As a result of the conditions disclosed plaintiff's president advised defendant January 19, 1927, that he was apprehensive that it would not be possible to find foundation material which would meet the requirements of the specifications to the effect that the excavation should be of sufficient depth "to secure foundation on sound ledge rock free from open seams or other objectionable defects." He further stated that in the event the specifications were adhered to, it seemed likely that an immense amount of excavation would have to be made but suggested a plan for carrying forward the work in which, in his opinion, the foundation material as then disclosed could be utilized with practically no additional general excavation. He further suggested that an immediate study be made of the situation with a view of determining a plan for future operations. The plan as suggested by plaintiff was not adopted, but after further discussion and consideration the defendant appointed a board of engineers, composed of representatives of the defendant, which convened at the site of the dam on April 11, 1927, for the purpose of studying the situation as presented and making recommendations. April 11 and 12, 1927, the board, accompanied by plaintiff's president, made a study of the site and situation as developed by the excavations, and on April 13, 1927, the board submitted a report making certain recommendations. April 21, 1927, the Chief Engineer of the Bureau of Reclamation visited the site, made a personal investi-

gation of conditions, and at or about the same time approved the aforementioned board report. In general, however, action thereunder was withheld pending the preparation by the Denver office of a general plan for carrying on the work and the preparation by the field office of detailed drawings in accordance with the general plan.

In carrying forward and completing the work under the contract, including an application of the recommendations of the board mentioned above, differences arose between plaintiff and defendant as to various items involved therein. Some of the differences were either adjusted or abandoned prior to the institution of this suit. However, six items remain in controversy which will be dealt with under appropriate headings in these findings.

Cut-Off Blocks

8. The original plans and specifications, which were attached to and became a part of the contract, provided for the construction of a cut-off wall at the upstream edge of the dam, the primary purpose of which was to form a watertight connection between the upstream face of the dam and the bedrock and thus prevent seepage or loss of water under the dam. While the plans and specifications indicated that the drawings were approximate and would be subject to revision as directed by defendant's representatives in charge of the work, the general plan was that the cut-off wall was to be built as a vertical keystone-shaped concrete wall or key sunk in the bedrock. The concrete forming the cut-off wall was to be poured into a trench in the solid rock below the rock surface and to be keyed and bonded into the irregular rock which constituted the bottom and sides of the trench. The top of the cut-off wall was to have a plane surface at or about level with the rock trench with a construction joint at the top of the cut-off wall where the face slab joined with the cut-off wall, from which point the face slab began and sloped upward and in a downstream direction at an angle of 45 degrees. Under these plans the cut-off wall would be poured as a separate operation from the face slab and buttress. Due to its location in the rock trench, a

very small amount of form work would be required in connection with its construction. The concrete in the cut-off wall was subject to classification in the schedule for payment as upstream cut-off at $6.00 per cubic yard.

9. Since, as shown in finding 7, the early excavations revealed a foundation material different in some respects from what was reasonably to be expected from the information available at the time of the execution of the contract and that it would be necessary to carry the excavations deeper than had been originally contemplated in order to reach solid rock into which the cut-off wall was to be constructed, one of the matters to which the board of engineers (also referred to in finding 7 and convened for the purpose of considering this situation) gave its attention was the type of construction to be carried out in connection with this cut-off wall. The board in considering the situation made certain comments and recommendations, among which were the following:

SUITABILITY OF ROCK FOR FOUNDATIONS AS DISCLOSED BY THE EXCAVATIONS.

The rock so far exposed in the excavation for buttress trenches and upstream cutoff is of excellent quality showing very few seams or lines of weakness except from buttress number fifty-three to the north end of the dam. This latter area more nearly represents what might have been expected, from the geologists' report, for the greater part of the foundation north of the creek.

The foundation so far exposed south of the creek is largely conglomerate of a bluish color and of excellent quality, in fact the south abutment would be entirely satisfactory as an abutment for an arch dam.

On the north side of the creek the foundation which is completed is largely of conglomerate and metamorphosed shale with massive strata of sandstone outcropping at the downstream end of the buttresses. It will be necessary to carry the upstream cutoff deeper and make the buttress footings wider in this section of the foundation than at the same elevation on the south abutment.

The cutoff trench from the south end of the dam to some point probably half way down the slope is not as deep as contemplated on the drawings but it is believed that a shallow cutoff with the number seven bars grouted

into the bed rock will make a better connection between the face slab and the foundation rock than to excavate a deeper cutoff into unusually sound rock with the probability of shattering the rock around the cutoff in making the excavation.

Several rather high points of rock have been left between some of the buttresses and it is believed that these points of rock should be removed in several instances where there is danger of the mass slipping against the buttress on the lower side at some time in the future due to possible disintegration and weathering. This condition obtains between buttresses 19 and 20, and 20 and 21 and the points or caps of rock are apparently separated from the more massive part between the buttresses by a seam having a dip of approximately 30% off the horizontal and toward the creek. On the north side of the creek a large point of rock has been left between buttresses 51 and 52 but this mass of rock is apparently very firmly supported and gives no evidence of any inclination to slide against the lower buttress at some future time.

Generally speaking, it is believed that any points or masses of rock between buttresses should be removed if there is any reasonable doubt as to their becoming unstable in future years due to disintegration. The extremely high cost of eight dollars per cubic yard for all solid rock excavation has limited the excavation between buttresses to the absolute minimum and even this minimum will exceed the estimate due to lack of sufficient data on foundation conditions or depth to suitable foundation rock.

Further recommendations were made with respect to grouting at certain places and the character of reinforcing material to be used in the concrete.

10. After the report of the board of engineers received the appropriate approval of the Denver office of the Bureau of Reclamation, under whose supervision the dam was being constructed, the excavation for the foundations was carried forward and a new general plan was prepared which provided for construction in connection with the cut-off and immediately adjacent part of the dam differing from that shown in the original plans and specifications. In place of a cut-off wall as heretofore described, the revised plans provided for a block construction which in its lower parts would extend down into the solid rock, but, instead of ending with

a level surface at or near the top of the solid rock excavation and providing a construction joint at that point for connection with the face slab, the block extended upward in the plane of the dam to various heights ranging up to as high as 12 to 15 feet and provided a construction joint at its top. In the lower part of the block, in most instances a variation was made in that a shallow but wide trench was provided in the rock instead of a key-shaped trench as heretofore described. Another part of the block took the place of what would have been constructed as a part of the face slab under the original plans and a further portion took the place of what would have been constructed as a part of the buttresses under the original plans.

11. The construction of these cut-off blocks was carried out on the basis of revised plans prepared by the defendant's representatives in charge of the work, a general plan being prepared by the Denver office for the work and then separate detailed plans by the field office for each block as the excavation for each block was completed. Because of the varying character of conditions revealed by the excavations, which were carried to the points necessary to secure a strong foundation, the several blocks differed in size and shape in order to conform to the contour of the ground and the character of foundation material revealed.

Each block was poured as one operation with the same mixture of concrete throughout, whereas under the original plans a different mixture would have been used for the cut-off wall from those provided for the face slab and buttresses. Reinforcing steel was used in the blocks which differed from that required under the original plans for the parts of the dam which the block took the place of.

12. The original cut-off wall, as called for by the original plans and drawings, would not have required the use of form work except for a few boards to serve as a bulkhead at the end of each day's pouring of concrete. The blocks which defendant required plaintiff to build required very elaborate and expensive forms. Some of these forms extended above the surface of the rock as high as 15 feet. These special forms had to be built in place and could not be used again like standard panel forms. These special forms had

to be fastened together with long bolts specially prepared by plaintiff from steel reinforcing bars. 37,699 pounds of these bolts were so used and the cost of the reinforcing steel so used in the sum of $753.98 was charged to plaintiff by defendant. The plans for each of these blocks in many instances called for offsets, keyways, protuberances and depressions so as to form a special shape to fit the contour of the foundation and to connect to other parts and members of the dam. The construction of the special forms for these blocks required the use of a large amount of lumber very little of which could be reused because the forms had to be torn down piece by piece after the concrete had set and the forms had served their purpose and heavy and expensive bracing and shoring was required to hold these high forms in place while being filled with concrete.

The heights of these new blocks as required by the new plans and drawings so issued by defendant, as aforesaid, were so fixed in the new plans and drawings that only 15 out of 48 stopped at standard lift lines above which lift lines standard form of panels could have been used, which made necessary further special and costly form work to reach the next standard lift in line above the top of these blocks. The original plans contemplated the use of standard panel forms above the first lift lines.

The special forms so made necessary by these new plans and drawings had to be trimmed and fitted around the rough and irregular foundation rock which caused an expense to plaintiff. Each of these new blocks were different.

13. As plaintiff proceeded with the construction of the cut-off blocks under the revised plans, the construction engineer for the defendant made tentative classifications of the quantities of concrete as poured, such classifications being for the purpose of making monthly progress payments, and plaintiff being advised that such classifications were tentative and that a final determination of the basis for payment would be made at the end of the work. Plaintiff made oral protest against the tentative classifications being made by the construction engineer, and on August 24, 1928, advised defendant in writing of its dissatisfaction with the classifications. October 31, 1928, plaintiff filed a protest which set

out in detail its objection to the classifications of the concrete contained in the cut-off blocks, and included with that communication a detailed statement of its costs sustained in their construction. One paragraph of that protest reads as follows:

> It is our contention that the omission of the horizontal joint between cut-off and deck constitutes a definite change in plan and brings in a class of concrete not provided for in the contract. There is no item in the original contract which even resembles these cut-off blocks as they were built, hence there is no method stipulated in the contract for paying for this work other than under Clause 13, Changes. The Government has made an arbitrary division of the concrete used in these cut-off blocks into three classes or contract items for payment, Item 9—Upstream Cut-offs; Item 13—Buttresses; and Item 16—Upstream Face Slabs. In general, the figure used was 60% payable as Upstream Cut-off, 30% payable as Buttresses and 10% payable as Deck. It is not claimed by the Government that this was by any means an exact computation. Since receiving the Government summary sheets showing the allowances made for different classes of concrete in these cut-off blocks, we have calculated the volumes as accurately as possible and find that the approximations made are in most cases erroneous.

14. In the meantime and prior to October 31, 1928, defendant's construction engineer made his final classifications of the concrete along lines similar to those followed in the tentative classifications. Since there was no one item in the schedule of unit prices for payment under the contract which corresponded to the mass of concrete included in a cut-off block, the construction engineer made his classifications by dividing the concrete contained in a given block among three items in the schedule, namely, (1) upstream and downstream cut-off and footing; (2) buttress, and (3) upstream face slab. This division was at first made by measuring a small number of blocks, determining the average percentages of classes of concrete, and then applying these percentages to all the blocks. Later the construction engineer computed the yardage of each block separately and classified the concrete contained in each block among the three unit items mentioned above.

Reporter's Statement of the Case

15. Plaintiff's protest of October 31, 1928, was forwarded to the Bureau of Reclamation, Denver, Colorado. After consideration the chief engineer on November 20, 1928, advised plaintiff in part as follows:

> Plans for the cutoff blocks were made to include in the same mass of concrete which filled the cutoff trench portions of the fact slab above and the adjoining buttress. In dividing the concrete of the cutoff blocks for payment such portions of face slab and buttress were classed as nearly as practicable in Items Nos. 16 and 13, respectively, at the corresponding contract prices. The planes of division are necessarily approximate and in a slight degree arbitrary, but the resulting classification on the whole is believed to be fair to the contractor.
>
> No sufficient reason is found for reclassification of concrete in the cutoff blocks nor for adding a supplementary contract establishing a new contract item. The methods used in classifying this concrete for the final estimate are approved. It does not appear that the concrete or the forms of the cutoff blocks as built differed so materially from the concrete or forms of all the concrete items of the schedule as to in effect justify the establishment of a new schedule item, or payment as extra work. No radical change in plans was made, nor were the contractor's costs increased by any peculiarity of the detail plans. The demonstration of the contractor's actual necessary cost for this part of the work, whether more or less than the amounts received in payment, is not essential.

December 24, 1928, plaintiff protested the decision by the chief engineer and asked for reconsideration. Conferences were had between plaintiff and representatives of the defendant between December 24, 1928, and November 1, 1930, and consideration was given from time to time by the defendant to plaintiff's protest. On the last-mentioned date plaintiff filed a further protest against the classifications of this concrete, supplied certain additional data, urged further consideration, and called attention to computations as made by plaintiff in an attempted allocation of the concrete among the three classes used by defendant which arrived at results differing from those arrived at in the division made by defendant.

January 2, 1931, the chief engineer affirmed his previous action, with a minor modification as follows:

> *Reclassification of concrete in cut-off blocks.*—This refers to the concrete of upstream cut-off trench, which was built in 48 separate blocks. Plans for the cut-off blocks were made to include in the same mass of concrete which filled the cut-off trench portions of the face slabs above and the adjoining buttress. In dividing the concrete of the cut-off blocks for payment such portions of face slab and buttress were classed in items Nos. 16 and 13, respectively, at the corresponding contract prices, and the remainder was placed under item No. 9, upstream and downstream cut-offs and buttress footing. In 11 blocks, from the buttress No. 27 to buttress No. 38, no face slab concrete was estimated in the original classification.
>
> Contractor objects to the method of computing payment for these blocks and requests a supplemental contract establishing a new contract item for this concrete and that the unit price therefor be fixed as contemplated by paragraph 13 of the specifications, or that the concrete in question be reclassified, placing a much greater amount in the higher-priced items.
>
> The claim has been reconsidered with the additional information submitted and it is not considered necessary to add a new contract item, since the concrete in cut-off blocks can be reasonably separated for payment into three items named in the schedule, as provided in paragraph 87 of the specifications. The amount of concrete to be classed as face slab has been recomputed in each block, including the 11 blocks between buttresses No. 27 and No. 38, in which no face-slab concrete was originally estimated. No objection is made by the contractor regarding the amount of concrete in cut-off blocks classed as buttress. The result of this recalculation is that the concrete classed as face slab is increased by 250.2 cubic yards, and the concrete under item No. 9 is decreased by a like amount, making a net increase in the estimate for payment of $500.40 and the claim is allowed to that extent. The remainder of the claim is disallowed.

In the consideration given by the chief engineer to the classifications as made by the construction engineer, a recomputation was made of each block and, while the additional amount paid plaintiff was relatively small on account thereof, the amount of concrete placed in the classifications of

the concrete for the blocks differed in each case from those fixed in the construction engineer's classifications. The reason for the variation in the several attempted classifications is that there were no seams, joints, or dividing lines of any kind within the blocks which would afford an accurate division of the concrete as among the three classifications attempted, and therefore any division would be an approximation.

16. The 48 cut-off blocks contained 4,073.12 cubic yards of concrete which was paid for by defendant under the three classifications mentioned in finding 14 at the unit prices specified therefor, in the schedule for payment, namely, upstream cut-off, $6 per cubic yard; buttress, $10.20 per cubic yard, and upstream face slab, $8 per cubic yard. They were constructed by plaintiff at a total cost of $45,416.54, included in which amount was $12,024.29 as a cost of form work. A reasonable amount for profit, superintendence, and general expenses incidental to such work is $6,812.48. Plaintiff has been paid a total amount of $29,018.98 for the construction of the cut-off blocks, and in accepting such payments plaintiff duly reserved its right to prosecute its claim on this item to the amount of $18,328.80.

Buttresses

17. The dam was constructed with 48 buttresses numbered from 9 on the south end to 56 on the north end, both numbers inclusive. Buttresses numbered 25 to 33, inclusive, are near to or in the stream bed and are the highest and also the thickest at the base; the other buttresses are of varying heights, ranging up to the sides of the hill on each side of the stream to the ends of the dam. The face slab or deck rests upon the sloping upstream edges of the buttresses.

Under the original plans and specifications each buttress was to be built on a concrete footing and the original drawing showed a section through buttress footing as a trench in rock partly filled with concrete and no forms would have been required for this footing concrete. The trench was to be excavated into the solid rock a specified depth, the depth being a proportion of the thickness of the buttress above and

with a specified bottom width, this width being 1½ times the thickness of the lower part of the buttress which rested upon a particular footing. The concrete for the footing was to be keyed and interlocked into the irregularities of the rock. The top of the footing was to have a level surface upon which the bottom of the buttress would rest and which would likewise serve as a support for the forms to be used in the construction of the buttresses. The buttresses extended from the footing upward to the crest of the dam, the height of each buttress depending upon the contour of the ground. The buttresses were constructed in lifts, each lift being 12 feet high. The thickness of the buttresses was decreased slightly at each lift, but the thickness of each buttress at the same elevation was the same. Forms were required for the construction of the buttresses.

18. Plaintiff's unit bid price for buttress footings was $6.00 per cubic yard and buttress concrete $10.20 per cubic yard. The difference in the two prices is accounted for by the fact that plaintiff, following the general practice in bidding on such work, bid a higher price for the buttresses than for the footings, because form work would be required for the construction of the former whereas, under the original plans and specifications, no form work was contemplated for the latter. Except for cost of form work, the cost of pouring concrete for these two classes of work was approximately the same.

19. Among the requirements with respect to excavation for the foundation of the dam was the following:

> The excavation for all parts of the dam, spillway, and outlet works shall be made to sufficient depth to secure foundation on sound ledge rock, free from open seams or other objectionable defects. Foundations for the buttresses of the dam shall be carried below the surface of the sound bedrock the minimum distance shown on the drawings or as directed by the engineer. Special precaution shall be taken to preserve the rock outside of and below the line of excavation in the soundest possible condition. Blasting may be done only to the extent approved by the engineer, with explosives of such moderate power and in such locations as will neither crack nor damage the rock outside of the prescribed limits of excavation. Whenever, in the opinion of the engineer,

further blasting is liable to injure the rock upon or against which concrete is to be placed, the use of explosives shall be discontinued and the excavation completed by wedging and barring or other suitable methods.

20. After, as shown in finding 9, the early excavations had revealed a foundation material differing in some respects from what was reasonably to be expected from the information available at the time of the execution of the contract, the board of engineers, referred to in findings 7 and 9, gave consideration at their meeting in April 1927, to the foundation material revealed by the excavations for the buttresses and made certain recommendations with respect thereto (see finding 9). As a result of their recommendations and after further consideration by other representatives of the defendant, revised plans were prepared for the construction of the buttress footings. Upon approval of the revised general plan, detailed drawings and specifications were prepared for the lower portion of each buttress, such drawings and specifications being prepared in the field as the excavation for each buttress was completed.

The new plans so issued by the resident engineer, as well as the revised general plans so issued by the Denver Office of the Bureau of Reclamation, required the construction of the buttresses different than that provided for by the original specifications and drawings. The new drawings did not provide for the pouring of footings for the buttresses into a trench excavated into the sound rock, but instead provided for the placing of the lower portion of the buttresses directly on top of what defendant determined to be rock sufficiently sound for a foundation for the buttresses, and instead of the first lift of a buttress resting upon a spread footing so poured into a trench, as provided in the original contract specifications and drawings, the lower portion of the buttress, as provided for in the new drawings, was increased in thickness and placed directly on the top of the rock, and nearly all such thickened sections of the buttress were extended upward a distance of several feet past the standard lift lines. Only one buttress, No. 17, of a total of 48 buttresses, was constructed with a spread footing poured into a trench and with the lower portion of the buttress based on the flat top thereof

and of the thickness provided for in the original contract drawings and specifications. All the remainder of the buttresses were built in accordance with the new separate plans and drawings issued for each of such buttresses and in accordance with the new revised general plans.

21. These thickened lower portions of the buttresses had the same reinforcing steel as the other portions of the buttresses at the same elevation and they were poured with the same mixture of concrete as the rest of the buttresses at the same elevation. In order to construct the buttresses, as provided for in the new plans and drawings, it was necessary to construct expensive special forms, the bottom of which had to be specially built to fit around the jagged contours of the rock excavation instead of being able to place the bottom of the form for the lower lift on the smooth top of a buttress footing as contemplated by the original plans and drawings, and because the thickened portions of the buttresses were extended upward beyond the first standard lift lines, it was also necessary to build other expensive special forms before the use of standard panel forms could be begun, which would not have been necessary had the lower lifts of the buttresses extended only to the first standard lift line as contemplated by the original plans and drawings.

In constructing these thickened lower portions of the buttresses plaintiff poured 3,409.94 cubic yards of concrete within special forms which plaintiff constructed at an increased cost of $6,618.67, as compared with the cost which would have been incurred in constructing them as provided for in the original contract specifications and drawings. The plaintiff was paid for this concrete on the basis of buttress footing concrete at $6.00 per cubic yard, which is $14,321.75 less than it would have been paid under the classification of buttress concrete at $10.20 per cubic yard.

22. After plaintiff had been advised by defendant's construction engineer that the concrete contained in the thickened lower lifts of the buttresses had been classified as buttress footing, plaintiff protested and urged that such concrete was in all respects similar to buttress concrete and therefore should be given that classification. Further pro-

test or appeal was made by plaintiff at times and in a manner similar to that in connection with the cut-off blocks to which reference was made in findings 13, 14, and 15, and similar action was taken by defendant's representatives with respect thereto to the end that on January 2, 1931, plaintiff's claim for a change in classification was finally denied. In accepting final payment plaintiff made due reservation of its right to prosecute its claim for this item.

Conduit

23. An item provided by the original plans and specifications was the construction of a reinforced concrete conduit 24 inches in inside diameter with an entrance or intake into the conduit through the upper stream face slab and extending downstream to a point where it would carry water to a farmer who owned certain water rights. The plans showed the location of the portion of the conduit within the dam and for a short distance below the dam, but the exact location for the conduit below the dam had not been staked out at the time the contract was signed by plaintiff and only general plans were shown for the construction of the conduit. The plans contained a notation "Conduit Elevation to be determined in Field." The conduit was to be located in a rock trench.

24. As the work proceeded in the construction of the dam the defendant made certain changes in the location of the conduit and issued revised plans and drawings for its construction in the new locations. Some of these changes pertained to the portion of the conduit within the dam and these changes, to the extent that they required additional work or cost on the part of the plaintiff over that required under the original plans and specifications, have been paid for by the defendant and are not involved in this suit. On the downstream side of the dam at the point where the conduit emerges from the dam, the location of the conduit was changed in the final plans from the north side of buttress 25, as shown in the original plans and specifications, to the south side of buttress 26, a distance of approximately 12 feet. The conduit then proceeded downstream for a distance of

approximately 375 feet. The elevation of the conduit and its location were designated with due regard to the contour of the ground and other factors incidental to, and reasonably contemplated by, the original plans and specifications. Plaintiff made the necessary excavation for the conduit, for which it was paid at the unit prices specified under the contract. The trench as excavated varied in width and depth in order to meet the conditions encountered where the conduit was located.

25. Forms were required for the construction of the conduit, the greater part of which was likewise reasonably contemplated by the original plans and specifications. All the concrete for the conduit, including the base or footing and the 12-inch shell surrounding the barrel or opening, was of the same mixture and each of the several lengths, constituting a day's pour, was poured as a single operation—without any division or line of demarcation between the so-called base and shell.

26. The total quantity of concrete poured by plaintiff in connection with the construction of the conduit was 179.72 cubic yards. Of that amount defendant's construction engineer classified 161.2 cubic yards under item 18, "Concrete: 24-inch circular conduit with 10-inch outlet valve" and 18.52 cubic yards under item 9, "Concrete: Upstream and downstream cut-off and buttress footings." The unit price for the former was $20.00 per cubic yard, whereas the latter was $6.00 per cubic yard, that is, a total difference with respect to the 18.52 cubic yards of $259.28. The latter quantity was determined by assigning to the latter classification all concrete which was poured in the base of the trench and 12 inches below the bottom of the interior bore of the conduit and the concrete above that quantity and surrounding the barrel of the conduit to the former classification. Payment was made to plaintiff on the basis of those classifications.

27. Plaintiff made protest against the classification of the 18.52 cubic yards of concrete referred to in finding 26, and urged that such concrete should be classified in the same manner as the other concrete poured in the construction of the conduit. Plaintiff's protests with respect to this item were at times and in a manner similar to those in connection

with the cut-off blocks heretofore referred to, and similar action was taken by defendant's representatives with respect thereto. In connection therewith, on November 1, 1930, in the final protest filed by plaintiff with the chief engineer, plaintiff for the first time asked for an allowance, in addition to the change in classification, due to an alleged increased quantity of form work. Defendant's final action on January 2, 1931, was as follows:

> *Reclassification of concrete under Troxel Conduit.*—This claim refers to classification of concrete in founda- of the Troxel conduit, 18.52 cubic yards. This concrete was not mentioned in any item of the schedule, but since it most nearly conforms to concrete under item No. 9, upstream and downstream cut-offs and buttress footings, it is classed and paid for under that item, as provided in paragraph 87 of the specifications. Request for reclassification is denied.

In accepting final payment under the contract plaintiff made due reservation of its right to prosecute its claim for additional compensation on account of the classification of the 18.52 cubic yards of concrete.

Closure

28. In the construction of this dam, in common with the general practice, it was necessary to make provision for the diversion and care of the stream across which the dam was being built, during the period in which construction operations were being carried on. In providing for the flow of water through the dam during that period it was customary, and that practice was followed in this case, to omit some sections of the upstream face slab for the purpose of permitting the water to flow between certain buttresses and then to have the concrete for these openings poured as a permanent part of the dam upon its final completion. Item 1 provided that plaintiff should be paid the lump-sum price of $100 for the "Diversion and care of Stony Creek during construction and unwatering foundations," and paragraph 57 of the specifications provided as follows:

> 57. *Diversion and care of river.*—The contractor shall construct and maintain all necessary cofferdams, flumes, and other diversion and protective works, and shall fur-

nish, install, maintain, and operate all pumps and other equipment required for unwatering the site of the work and maintaining the foundations free from water during construction. The lower portions of a sufficient number of face slabs may be omitted to permit the passage of flood waters. The number, size, and location of these openings and the time of closing shall be subject to the approval of the engineer. The openings shall be so located as to avoid interference with the construction of the spillway, or the installation of the outlet works, and shall not be closed until after other facilities for handling flood waters are available. An entire section of the dam, including one or more buttresses, may, at the option of the contractor, be omitted during the earlier stages of the work in order to pass the stream flow, provided the construction of such omitted sections shall be commenced not later than immediately after the flood season of 1927–28 is past and brought to the level of the remainder of the dam in ample time, as determined by the engineer, to insure the safe completion thereof coincident with the completion of the remainder of the dam. Closures shall be carefully made to avoid leakage through joints with old work. Water shall not be permitted to rise against any closing slab, or other part of the concrete structure before the concrete has set for at least four weeks under favorable temperature conditions. The contractor shall be responsible for and shall repair any damage to the dam, spillway, or other parts of the work, caused by floods or by failure of any part of the protective works prior to final acceptance. After having served their purpose, cofferdams shall be removed, or leveled, and all temporary structures shall be removed in a manner satisfactory to the engineer, to give a sightly appearance, and to permit the unobstructed flow of water through the outlet works and spillway. The contractor shall not interfere with the natural flow, or the flow of storage water required for irrigation, without the approval of the engineer. The diversion dam for the Angle Troxel irrigation ditch is on the area to be occupied by the dam, as shown on the drawings. The contractor shall provide any necessary means or structures required for the diversion of water into this ditch at all times until the completion of the work, and until the permanent outlet works and conduit provided in the designs for this ditch are completed and in service. All such temporary work and structures shall be subject to the approval of the engineer. The cost of furnishing all labor and materials and construct-

> ing and removing cofferdams, diverting the river, caring for the temporary diversion to the Angle Troxel ditch, and of all other work required by this paragraph, except the placing of concrete in the diversion openings in the dam, shall be included in the lump-sum bid in the schedule for diversion and care of river during construction and unwatering of the foundations.

29. The original plans and specifications do not show any diversion openings or closure structure, but it was within the reasonable contemplation of these plans and specifications that provision should be made for the diversion of the stream and the carrying out of the necessary work to effect a closure of the opening in the dam through which the water had been diverted. As the work progressed plaintiff was requested by defendant to furnish plans to close the openings that had been left in the dam. In accordance with that request plaintiff furnished three alternate types of closure. Defendant selected one of these types, which, with minor modifications, was incorporated in the general plan for the construction of the dam and used by plaintiff under defendant's directions in carrying out the work.

30. The openings in the dam for which the closure structure was required were between buttresses 32 and 33 and between buttresses 33 and 34, and in accordance with the plans as adopted the closure structure was built by extending the lower portions of these buttresses upstream approximately 15 feet and carrying out the face slab horizontally to form a roof or top over these extended portions of the buttresses, the buttresses thus forming two sides of the openings and the flattened or extended portion of the face slab forming the top. The height of the openings thus formed was approximately 8 feet. Grooves were provided in the extended portions of the buttresses so that when it came time to close the dam a timber gate was put into the grooves, thus closing off the water while concrete was poured to make the permanent closure.

31. In the course of construction plaintiff also built cofferdams of earth and timber and installed and operated pumps for the purpose of diverting the stream, protecting the work being carried on, and unwatering foundation areas. Upon

the completion of the work all cofferdams and temporary structures of that character were required to be removed. The defendant, however, did not require plaintiff to remove the closure structure heretofore referred to, that is, the extended portions of the buttresses and the flattened or extended portion of the face slab which formed a roof for this opening. However, after the completion of the dam this structure served no useful purpose in connection with the dam.

32. Upon the completion of the dam defendant refused to pay plaintiff for the construction of the closure structure other than such payment as was included in the lump-sum payment of $100 under item 1 of the contract designated "Diversion and care of Stony Creek, during construction and unwatering foundations." The extended portions of the buttresses, which were poured as a part of the buttresses, and of the same mixture and consistency, contained 38.8 cubic yards of concrete. The roof of the structure which was poured as a part of the deck or face slab and of the same mixture and consistency contained 45.4 cubic yards of concrete. In the construction of the closure structure 3,664 pounds of reinforcing steel and 444 sacks of cement were used.

33. Defendant not only refused to make payment for the construction of this structure but also deducted from sums otherwise due plaintiff, $73.28 on account of the reinforcing steel and $219.96 on account of the cement used therein. Plaintiff made due protest on account of such refusal to make payment, at times and in a manner similar to that with respect to the cut-off blocks heretofore referred to, and the defendant's action was similar on this item, to the end that on January 2, 1931, defendant reaffirmed prior refusals to make payment. In accepting final payment under the contract plaintiff made due reservation of its right to prosecute this claim.

Gate Slab

34. The drawings which formed a part of the contract required plaintiff to place upon the upstream face slab of the dam for each of the three spillway gates a layer or slab of concrete 9½ inches thick upon which the rubber waterproofing members or sealing strips of the gates would travel

while the gates were being lowered or raised. A notation on the drawing for the gate slab stated: "Concrete to be Steel Troweled and rubbed with Carborundum Brick to the True Plane of the Roller Track, with tolerance of $\frac{1}{8}'' \pm$ as directed by the Engineer."

35. Plaintiff poured the concrete for the gate slab within tolerance lines permitted by the above notation, but when the slabs were completed and the concrete had set it was found that the rubber sealing strips would not operate, for the reason that there were certain high spots on the gate slab. Defendant's construction engineer instructed plaintiff to chip off the high spots and otherwise alter or fix the gate slab so that the strips would operate. Plaintiff carried out this work as verbally directed by defendant's construction engineer, who at the time stated he would recommend payment for its cost as extra work. The cost of this work, amounting to $199.68, was submitted to the construction engineer, but he did not approve the item for payment.

36. When plaintiff filed its protest of October 31, 1928 (see finding 15), with respect to various items, it also set out in the protest certain items with respect to which plaintiff stated it understood claims therefor were being allowed, and the gate-slab item was included in that list. However, upon consideration by the chief engineer plaintiff was advised on November 20, 1928, that no payment would be allowed on account of the gate-slab item. Further protests and appeals were taken in a manner similar to that with respect to cut-off blocks, and on January 2, 1931, the chief engineer affirmed his previous disallowance of the claim on this item. In accepting final payment plaintiff made due reservation of its right to prosecute its claim on this item.

Excess Cement

37. Prior to the time when plaintiff began the construction of the dam, defendant had acquired certain land near the site of the dam upon which were located pits containing sand, gravel, and cobbles. Defendant caused tests to be made by the United States Bureau of Standards of the aggregates taken from these pits, and since such tests showed that the aggregates were satisfactory for use in the making of con-

crete for this dam, the defendant gave its approval to the procuring by plaintiff of the aggregates from that source.

38. The defendant from time to time prescribed the proportions of cement, sand, gravel, and water which should be used for the various mixes which were deemed necessary by the defendant for the various classes of concrete work on the dam, and the plaintiff adhered to the mixes as thus prescribed. The proportions for these mixes differed from the proportions set out in paragraph 67 of the specifications. In the beginning the defendant did, however, attempt to adhere to the compressive strengths set out in that specification, namely, that for a part of the work the concrete produced should have a compressive strength at 28 days of 2,000 pounds per square inch and that another part should have a compressive strength at 28 days of 2,500 pounds per square inch. In order to determine whether the required compressive strength was being attained defendant made laboratory tests from time to time as the mixtures were prepared and, as a result thereof, specified the quantity of the various ingredients entering into the concrete. These tests were made during the early part of the work and until about February or March 1928, by taking a steel cylinder 6 inches in diameter and 12 feet high, filling it with a sample of the concrete of a given mixture, letting it stand for 28 days and then placing it in a high compression ram or press and applying pressure to the top of the cylinder until it was caused to be broken. A gauge on the ram or press showed the strength at which the cylinder was broken. In preparing these cylinders they were placed upon a sheet-iron base which had some irregularities or corrugations thereon, with the result that the concrete at the ends of the cylinders did not form an entirely plane surface. Accordingly when pressure was applied to the top of the cylinders incorrect results were obtained, for the reason that the pressure of the ram or press did not operate evenly over the entire surface, and the concrete in the cylinders was shown as breaking at a much lower strength than would have been shown had the pressure been applied to a smooth surface. As low compressive strengths for the cylinders were reported, defendant's representatives increased the cement in the mixtures from time

to time in order to produce concrete of the strengths called for in the specifications.

39. About February or March 1928, defendant changed from the use of a sheet-iron base in the preparation of these cylinders to the use in some instances of a base of machined cast-iron, and in others to a base of plate glass, both of which produced a smooth surface for the concrete at the ends of the cylinders. As a result of tests made by the new method, which is the method prescribed by recognized authorities on testing concrete, it was found that the strength which had been shown by the former method to have been approximately 2,000 and 2,500 pounds per square inch was in reality greatly in excess, and, in some instances, double or more than double what the former tests had shown.

40. At the time the error in making the tests was discovered approximately three-fourths of the entire concrete on the job had been poured, but defendant made no change in the mixtures because satisfactory results were being obtained and the defendant desired the best quality of material and workmanship on the job. The work was accordingly completed on that basis. In order to procure the strengths thus specified by the defendant, plaintiff used 93,352 more sacks of cement than would have been required in order to have obtained concrete of the strengths set out in the specifications. Plaintiff was required to handle this excess cement, which handling included all operations necessary to transport the cement from Fruto, California, to the site of the dam and use it in the various operations incident to the mixing and pouring of the concrete. In addition plaintiff was required to clean the empty bags and return them to the railway station at Fruto, California. Plaintiff was also charged with the cost of any lost or torn bags on the cement used.

41. As plaintiff learned of the excessive amounts of cement being used in order to produce the higher strengths, demand was made for payment for the cost of hauling, handling, and other similar operations incident to this excess cement. The first written request for payment was filed on August 24, 1928, which was followed by a more detailed statement on October 31, 1928, setting out an alleged increased cost of

$9,858.67. Defendant acted on this protest November 20, 1928, in the following manner:

The quantity of cement per cubic yard of concrete used in construction of Stony Gorge Dam was about 12.75% more on the average than the amount contemplated, or more than would have been used in the proportions mentioned in paragraph 67 of the specifications, the excess being calculated as 28,286 sacks. This is considered a change of plans and, as provided in paragraph 13 of the specifications, the contractor is entitled to receive an additional payment on this account, equivalent to the consequent increase in costs. The increased proportion of cement in the concrete favorably affected its workability and decreased the cost of placing concrete in certain parts of the structure, for which benefit to the contractor a deduction is made. The calculation of net increase of cost is computed as follows:

28,286 sacks=1,343 tons.		
Hauling 1,343 tons at $1.20	$1,611.60	
Returning sacks, 14.143 tons at $1.20	16.97	
Sack loss, 1,471 sacks at $0.10	147.10	
Handling excess cement (see below)	1,105.15	
	2,880.82	
Add 15%	432.12	
Total increase of cost		$3,312.94
Deduct for increased workability by reason of additional cement in concrete chuted to face slabs, tongues, and corbels, 13,565 cubic yards at $0.05		678.25
Net amount due		2,634.69
Cost of handling excess cement is computed as follows:		
Labor mixing and placing concrete, whole job	$36,067.42	
25% of above was for handling cement		9,016.85
Receiving cement		101.21
Handling sacks		644.80
Cost of handling cement and sacks, whole job		9,762.86
Excess cement was 11.32% of amount used		1,105.15

The amount due, $2,634.69, is included in the order covering change of plans.

42. After the foregoing action plaintiff made further protest and conferences were held, but no further action was taken by defendant until after November 1, 1930, on which date plaintiff submitted an additional protest or appeal for reconsideration. In that protest plaintiff set out a revised computation of its claim, in which the excess quantity of cement was shown at 93,352 sacks instead of 75,725 as shown in its earlier computation. January 2, 1931, the acting chief

engineer of the Bureau of Reclamation advised plaintiff of action on the protest as follows:

Hauling and handling excess cement.—The quantity of cement per cubic yard of concrete used in construction of Stony Gorge Dam was more on the average than the amount contemplated in the specifications. This is considered a change of plans and, as provided in paragraph 13 of the specifications, the contractor is entitled to receive an additional payment on this account, equivalent to the consequent increase in costs. This item is one in which difficulty has been experienced in arriving at the correct amount for which settlement should be made. Contractor's claim of October 31, 1928, was for hauling and handling 74,725 sacks excess cement. This office was not at first in agreement, but had at that time insufficient data from which to compute the amount of excess. Since that date this bureau has had made some laboratory tests of materials similar to those used in the construction of Stony Gorge Dam with the purpose of determining the amount of excess cement used, resulting in the conclusion that the amount claimed by contractor is practically correct.

The increased proportion of cement in the concrete favorably affected its workability and decreased the cost of placing concrete in certain parts of the structure, for which benefit to the contractor a deduction is made. Another deduction is made for cost of aggregates saved, being displaced by the excess cement.

The net increase of cost to the contractor due to handling and hauling excess cement is computed as follows:

74,725 sacks cement=3,549 tons.		
Hauling 3,549 tons at $1.20		$4, 258. 80
Returning sacks, 37.362 tons at $1.20		44. 83
Sack loss, 3,890 sacks at $0.10		389. 00
Handling excess cement		2, 889. 81
Sub-total		7, 582. 44
Add 15%		1, 137. 37
		8, 719. 81
Deduct for increased workability by reason of additional cement in concrete chuted to face slabs, tongues, and corbels:		
13,565 cu. yds. at $0.05	$678. 25	
Deduct cost of aggregates displaced by excess cement:		
1,937.3 cu. yds. aggregate at $0.75	1, 452. 98	
		2, 131. 23
Net increase of cost		6, 588. 58

The amount due ($6,588.58) is included in the order covering changes of plans.

The increased allowance was duly paid to plaintiff.

After this job was completed, an accurate determination of the amount of excess cement used could not be made. While it was apparent that an excess of cement had been used to obtain the required strength, it was difficult to compute how much less cement could have been used and yet obtain the required qualities of density, impermeability, durability, and workability of the cement.

43. The excess cement used did not result in a saving to plaintiff by reason of any increased workability of the concrete poured, and no saving to plaintiff was effected by reason of displacement of aggregates with cement since plaintiff's subcontractor was required to furnish and deliver to plaintiff all sand and gravel needed for the work for the entire job and the subcontractor was paid therefor on the basis of 75 cents for each cubic yard of concrete produced, regardless of the amount of such aggregate required to produce a given yard of concrete.

44. The mixture specified by defendant's representatives and used by plaintiff in carrying on the work produced concrete of a very satisfactory character for the dam and the dam as completed was a highly satisfactory structure. However, concrete of the desired strength specified in the contract and having the other characteristics required, including workability, maximum density, impermeability, and durability, could have been produced without the use of the excess cement of 93,352 sacks heretofore referred to. The cost to plaintiff of handling this excess cement, including 15 per cent as a reasonable amount for profit, superintendence, and general expenses incident thereto, was $12,966.48. As shown in finding 42, defendant allowed and paid plaintiff $6,588.58 on account of this extra work. In accepting final payment under the contract plaintiff made due reservation of its right to prosecute its claim on this item.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

In response to an invitation of the defendant, the plaintiff, on August 18, 1926, submitted its bid for the construc-

tion of a dam, known as the Stony Gorge Dam, across Stony Creek for the Orland irrigation project about 8 miles west of Fruto, California. It was stated in the invitation for bids that the principal items involved are about 19,000 cubic yards of excavation; about 37,200 cubic yards of concrete; drilling and grouting about 7,000 linear feet of grout holes; bending and placing of about 1,500,000 pounds of reinforcing steel; and installing about 892,000 pounds of valves, gates, and other metal work. Forty-two separate items of work were enumerated in the invitation, and unit prices were invited for the various classes of work involved.

Prior to advertising for bids the defendant made an investigation of the site for the proposed dam to determine its suitability therefor, and to decide on the type of dam to be constructed. In making this investigation core-drill test holes were drilled in the bottom of the creek and test pits were made in the locations for the dam abutments where solid rock was not exposed. The results of these investigations were made available to bidders through the invitation for bids, although it was stated that "the accuracy of the interpretation of the facts disclosed by borings or other preliminary investigations is not guaranteed." Prior to the invitation for bids the defendant had also prepared detailed drawings and specifications covering the work to be done. These specifications, together with a circular advertisement inviting bids on the proposed work, were furnished plaintiff. Prior to the submission of its bid plaintiff made a personal investigation at the site of the proposed dam. The plaintiff's bid was accepted, and on October 2, 1926, the plaintiff and the defendant entered into a formal contract for the construction of the dam. The plaintiff's bid and the specifications of the work were incorporated in and made a part of the contract.

The contract in general provided that materials entering into the construction of the dam, including cement and structural steel and reinforcing steel, would be furnished by the defendant and that the labor thereon would be performed by the plaintiff. It provided for the performance of 42 separate items of work, which with a single exception would be paid for at unit prices. The concrete to be placed

in the dam appeared under 14 different classifications. The unit prices with respect to the pouring of the concrete varied from $6.00 per cubic yard for upstream and downstream cut-offs and buttress footings to $20.00 for 24-inch circular conduit from 10-inch outlet valve, and the estimated quantities shown varied from 70 cubic yards for "trash rack structure floors" and 100 cubic yards for "24-inch circular conduit" to 23,500 cubic yards for "buttresses including tongues and corbels."

The plaintiff began operations by the removal of the earth from the top of the rock and when rock was reached it was ascertained that the rock was of such a character as not to be suitable for the construction of the dam as originally planned. Plaintiff called this fact to the attention of the engineer, and a board of experts appointed by the defendant visited the site, examined the conditions, and rendered a report in which certain definite and material changes in respect to the construction of the dam were recommended. Subsequently, the chief engineer of the Bureau of Reclamation visited the site, made a personal investigation of the conditions, and approved the recommendations of the board. The Denver office of the defendant later prepared drawings for the performance of the work in accordance with the modified plans agreed upon by the defendant's officers, and the work under the contract thereafter was carried on and completed by plaintiff in accordance therewith. In carrying forward such work differences arose between the plaintiff and the defendant in respect to payment of various items involved. Many of these differences were satisfactorily adjusted. Certain differences, however, were impossible of adjustment and plaintiff upon settlement for the work performed by it under the contract reserved the right to maintain suit on the following items:

1. Cut-off wall, $23,210.04.—The cut-off wall as contemplated by the original specifications and drawings was to be a vertical keystone-shaped wall of concrete extending across the upstream toe of the dam and which was to form a connection between the upstream portion of the dam and underlying rock. Under the original plans this was to be

poured into a trench excavated into the solid rock. The sides and bottom of the rock would be irregular and jagged in shape and contour and the concrete being poured into this sort of a trench would become keyed and bonded into the solid rock. The top of the cut-off wall was to have a plane or flat surface about level with the surface of the rock and there was to be a construction joint at the top of this cut-off wall. The face-slab was to fit into this construction joint on top of the cut-off wall and was then to slope upward in a downstream direction at an angle of 45 degrees. Under such plans there would be absolutely no reason for any form work in the construction of the cut-off wall because the concrete was to be poured into the rock trench and the sides and bottom of the trench would form the retaining surfaces for the concrete. The cut-off wall was to be poured as one operation separate from the face slabs and the buttresses. Under the new plan the original cut-off wall was not constructed as a continuous wall but as a separate mass of blocks. The engineers issued separate plans for the blocks between each pair of buttresses. The cut-off blocks were entirely different in every respect from the cut-off wall originally designed, some of the major differences being as follows: the original cut-off wall was to be poured into a trench in the rock while the new cut-off blocks were not poured into a trench; the original cut-off required no forms while the new cut-off blocks required forms on all sides except the bottom; the reinforcing steel in the new cut-off blocks was different from that in the old cut-off wall; the shape of the cut-off blocks was different from that of the old cut-off wall; the size of the new cut-off blocks was entirely different from that of the old cut-off wall; there was no construction joint on the top of the cut-off blocks, whereas such a joint existed on the top of the cut-off wall; the old cut-off wall was to be poured as a separate operation from the buttresses and face slab, whereas in the new cut-off block part of the face slab and buttresses was poured at the same time; the old cut-off wall was separate from the buttresses and face slab while the new cut-off blocks included a part of the buttresses and face slab; the cost of constructing the cut-off blocks was

greatly increased over what it would have cost to have constructed the cut-off wall.

As the work proceeded in the construction of the cut-off blocks, the defendant made tentative classifications of the concrete in these blocks for the purposes of monthly payments, and plaintiff was advised that these were only tentative and a final determination would be made at the end of the work. Plaintiff protested the tentative payments. At first the Government made a division of the concrete in these cut-off blocks on a percentage basis, namely, 60 per cent upstream cut-off concrete, 30 per cent buttress concrete, and 10 per cent face slab concrete. The plaintiff continued its protests and about the end of the work the construction engineer made his final division of the concrete in these blocks along the lines followed in the tentative payments.

There was no item of the schedule of unit prices which corresponded with the mass of concrete in the cut-off blocks and therefore the defendant necessarily made its divisions as to the types of concrete along wholly imaginary lines. No actual lines existed. Plaintiff protested the division of the concrete as made by the construction engineer. This protest was answered by the Chief Engineer of the Bureau of Reclamation who stated:

> Plans for the cutoff blocks were made to include in the same mass of concrete which filled the cutoff trench portions of the face slab above and the adjoining buttress. In dividing the concrete of the cutoff blocks for payment such portions of face slab and buttress were classed as nearly as practicable in Items Nos. 16 and 13, respectively, at the corresponding contract prices. The planes of division are necessarily approximate and in a slight degree arbitrary, but the resulting classification on the whole is believed to be fair to the contractor.

The Chief Engineer, however, subsequently reconsidered his decision and made a recomputation of the quantities of the various types of concrete contained in the cut-off blocks, and increased slightly the amounts previously paid plaintiff for the work, making the total amount paid the sum of $29,-018.98, which plaintiff accepted under protest, reserving the right to maintain suit for a larger amount.

Paragraph 50 of the specifications provides:

> *Right to change location and plans.*—When additional information regarding foundation conditions becomes available as a result of the excavation work or of further test drilling, it may be found desirable to change the location, alignment, dimensions, or design of the dam, spillway, or appurtenant works, to take advantage of natural conditions. The United States reserves the right to make such reasonable changes as may be considered necessary or desirable, and the contractor shall be entitled to no extra compensation because of such changes, except that any increase in the excavation, concrete, or other work required, will be paid for at the unit prices bid in the schedule. The contractor's plant shall be laid out to accommodate any reasonable change in the location or design of the dam or spillway or any part thereof without additional cost to the United States.

The substitution of cut-off blocks for the cut-off wall provided for in the original specifications, materially changed both the character and the cost of the work. The cost of the work to plaintiff was materially changed in that plaintiff in constructing the cut-off blocks was required to furnish forms for the pouring of the concrete, which in most part would not have been required in the construction of the cut-off wall. This was not a "reasonable" change, within the meaning of the specifications, which plaintiff was required to make without extra compensation. *Salt Lake City* v. *Smith*, 104 Fed. 457; *Wood* v. *Fort Wayne*, 119 U. S. 312; *Freund* v. *United States*, 260 U. S. 60; *Henderson Bridge Company* v. *McGrath*, 134 U. S. 260; *Board of Directors, etc.*, v. *Roach*, 174 Fed. 949; *Drainage District No. 1, etc.*, v. *Rude*, 21 Fed. (2d) 257; *Six Companies, Inc.*, v. *United States*, 85 C. Cls. 687.

In *Salt Lake City* v. *Smith*, *supra*, the court said:

> * * * The dry words and broad stipulations of contracts must be read and interpreted in the light of reason and of the subject contemplated by the parties. The stipulation common to many corporation contracts, that contractors may be required to perform extra work at the price named in the agreement or fixed by an engineer, is limited by the subject-matter of the contract to such proportionally small amounts of extra work as

may become necessary to the completion of the undertaking contemplated by the parties when the contract was made; and work which does not fall within this limitation is new and different from that covered by the agreement, and the contractor may recover the reasonable value thereof notwithstanding the contract. The customary provisions in such contracts that the corporation or its engineer may make any necessary or desirable alterations in the work, and that the contractors shall receive the contract price or a price fixed by the engineer for the work or materials required by the alterations, is limited in the same way, by the intention of the parties when the contract was made, to such modifications of the work described in the contract as do not radically change its nature or its cost. Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value. *Cook Co.* v. *Harms*, 108 Ill. 151, 158, 159; *Bridge Co.* v. *McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; *City of Elgin* v. *Joslyn* (Ill. Sup.) 26 N. E. 1090, 1092; *Sexton* v. *City of Chicago*, 107 Ill. 323, 330; *Kirk* v. *Manufacturing Co.*, 118 Ill. 567, 8 N. E. 815; *Railway Co.* v. *Vosburgh*, 45 Ill. 311, 314; *Railroad Co.* v. *Smith*, 75 Ill. 496, 507. The stipulation in such contracts that all questions, differences, or controversies which may arise between the corporation and the contractor under or in reference to the agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to the engineer, and his decision thereof shall be final and conclusive upon both parties, does not give the engineer jurisdiction to determine that work which is not done under the contract or specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive upon the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it upon himself by erroneously deciding that he has it.

Paragraph 87 of the specifications provides:

Division of concrete for payment.—Concrete will be separated for payment into the items named in the schedule. The division between the various items shall

> be determined by the engineer. Any small amount of concrete required to be placed which does not come within any of the items named in the schedule shall be placed in that item to which it most nearly conforms, or if it differs materially from all the items named, it shall be ordered in writing and paid for as extra work, under the terms of paragraph 14 of these specifications.

There was no item in the schedule of unit prices for concrete which corresponds with the mass of concrete in the cut-off blocks. The construction of the blocks was therefore new and different work not governed by the contract, the reasonable value of which plaintiff, under the authorities cited, may recover.

Paragraph 14 of the specifications provides that work or material ordered by the engineers not covered by the specifications will be classed as extra work and "shall be charged for at actual necessary cost, as determined by the engineer, plus 15 per cent for profit, superintendence, and general expenses." While no formal change order was issued by the engineer under this paragraph of the specifications directing the substitution of the cut-off blocks for the cut-off wall, the construction of the blocks in fact constituted "extra work," and plaintiff is entitled to be compensated for the work on that basis.

The plaintiff constructed 48 cut-off blocks containing 4,073.12 cubic yards of concrete at an actual cost to plaintiff of $45,416.54, which amount includes $12,024.29, the cost of the form work required. A reasonable amount for profit, superintendence, and general expenses incidental to the work is $6,812.48, making the total compensation plaintiff is entitled to receive for this work $52,229.02. Plaintiff has been paid for the work $29,018.98, leaving a balance due of $23,-210.04, which amount plaintiff is entitled to recover on this item of the claim.

2. Buttresses, $20,940.42.—The dam was constructed with 48 buttresses which extended parallel to the bed of the stream and reached from the rock at the bottom to the crest of the dam. The face slab rested on the sloping upstream edge of these buttresses. The buttresses were of various heights. Those high up on the hillside near the ends of the dam were

lower than the buttresses near the middle of the dam which extended from the crest to the rock in the bed of the stream. The buttresses were all the same thickness at the crest of the dam, and for each 12 feet that they extended downward from the crest of the dam there was an increase in thickness in each succeeding lower portion. Thus, it was provided for in the original contract that each buttress was to be of the same thickness at the same elevation. The original plans and specifications provided that the buttresses should be on a concrete footing and that the footing should be poured into a trench cut into the solid rock. No form work would have been required for the pouring of the footing. This footing was to be a keystone-shaped concrete structure with the top flat and level. The footing was to be one and one-half times the thickness of the lower portion of the buttress which rested upon this footing, and there was thus a part of the flat surface of the top of the footing extending on each side beyond the lower portion of the buttress which rested upon such footing. The buttresses were to be built in forms. As originally planned, the bottom of the forms for the buttresses would rest on the smooth, flat surface of the footing. In several instances, the original plans required that there would be a lift of less than twelve feet between the top of the buttress footings and the first regular lift line resulting from lift lines at 12-foot intervals down from the crest of the dam. Under the original plans, these lower sectional lifts would be built in straight-sided form work requiring no unusual work and many of them could be reused, and after the first lift line was reached the standard panel forms could be used on each lift to the crest of the dam. The standard panel forms were built so that they could be moved intact from one place to another and thus could be reused many times with a consequent decrease in the cost of form work.

The board of experts, heretofore mentioned, in its report recommended certain changes in the construction of the buttresses, and the Denver Office of the Bureau of Reclamation issued a new general plan concerning the lower portion of the buttresses and from time to time thereafter as the excavations in the respective places were uncovered the field

office issued detailed plans carrying into effect this new general plan as to each buttress. The plaintiff was required by defendant to build the buttresses in accordance with such new plans. For the buttresses as actually built as required by these new plans no buttress footings were constructed. The buttress was rested directly on top of the rock excavation. There was no concrete poured into a trench in the rock. Form work had to be used down to the bottom of the buttresses and to the top of the rock on which the buttress rested. The form work where it met the rock had to be scribed and fitted with great care, accuracy, and expense around the irregular contour and jagged surface of the top of the rock. The entire lower portion of each buttress was made one and one-half times the thickness of the portion which rested immediately thereon. This lower thickened portion of the buttress was extended upward for a distance of several feet and in many instances past the regular lift lines and thus the special form work extended upward for many feet. The passing of normal lift lines also required the use of many additional sectional forms before the standard panel forms could be used, thus further increasing the cost.

The plaintiff contended that payment should be made for this concrete in the thickened lower portions of the buttress at $10.20 per cubic yard, which was the unit price in the contract schedule of prices for buttress concrete, and also contended that since additional special form work was required the increased cost caused by this special form work should be paid to it. The defendant determined that under the contract this concrete in the lower thickened portions of the buttresses should be paid for at $6.00 per cubic yard, which was the unit schedule price for buttress footing concrete and that no additional sum should be paid for the special form work required. The plaintiff protested against this refusal by the Government to pay in accordance with plaintiff's demands and accepted the payment of $6.00 per cubic yard under protest and in this suit now claims the difference between the $10.20 per cubic yard and the $6.00 per cubic yard which it has received and also the extra cost of the special form work.

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We think the plaintiff is right in the contention that the concrete involved in this item of the claim should have been paid for as buttress concrete at $10.20 per cubic yard. Buttress footing was entirely eliminated in the new plans and instead the lower portion of the buttresses was thickened and set directly on top of the rock with no footing poured into a trench in the rock. The thickened lower portions of the buttresses had the same reinforcing steel as other portions of the buttresses at the same elevation. They were of the same mixture of concrete as the rest of the buttresses at the same elevation. They were the same as the lower portion of the buttresses shown on the original specifications, with the exception that they had been thickened and instead of resting on the buttress footing were placed directly on top of the rock. They were in all respects buttress concrete. They were not poured into a trench in the rock as was buttress footing concrete described in the original plans, and they were not in any sense like buttress footing concrete.

The findings show that there were 3,409.94 cubic yards of concrete in the thickened lower portions of the buttresses here involved. Plaintiff was paid for this concrete $6.00 per cubic yard, the schedule price for buttress footing concrete. The defendant's classification of this concrete as buttress footing concrete was arbitrary and erroneous. It should have been classified as buttress concrete and paid for at the rate of $10.20 a cubic yard, the unit price provided in the schedule for buttress concrete. The difference between what plaintiff was paid for the concrete and what it should have been paid under a proper classification of the concrete amounts to $14,321.75. This amount it is clearly entitled to recover. Plaintiff is also entitled to recover in respect to this item of its claim the sum of $6,618.67, the increased cost of the special form work over what the cost of the form work would have been had the buttresses been constructed in accordance with the original specifications. Plaintiff is therefore entitled to recover on these items the amount claimed, $20,940.42.

3. Balance due on conduit concrete and increased cost of conduit form work, $1,532.88.—The specifications provided

for the construction of a conduit to supply water to a farmer downstream from the dam. The plans showed the location of the portion of the conduit within the dam and for a short distance below the dam, but the exact location for the conduit below the dam had not been staked out at the time the contract was signed and only general plans were shown for the construction of the conduit. The defendant made certain changes in the location of the conduit and issued revised plans and drawings for its construction in the new location. Some of these changes pertained to the portion of the conduit within the dam and these changes, to the extent they required additional work or cost on the part of the plaintiff over that required under the original plans and specifications, have been paid for and are not involved in this suit. On the downstream side of the dam at the point where the conduit emerges from the dam, the location of the conduit was changed in the final plans from the north side of buttress 25, as shown in the original plans and specifications, to the south side of buttress 26, a distance of approximately 12 feet. The conduit then proceeded downstream for a distance of approximately 375 feet. The elevation of the conduit and its location were designated with due regard to the contour of the ground and other factors incidental to, and reasonably contemplated by, the original plans and specifications. Plaintiff made the necessary excavation for the conduit, for which it was paid at the unit prices specified under the contract. The trench as excavated varied in width and depth in order to meet the conditions encountered where the conduit was located.

The total quantity of concrete poured by plaintiff in connection with the construction of the conduit was 179.72 cubic yards. Of that amount defendant's construction engineer classified 161.2 cubic yards under item 18, "Concrete: 24-inch circular conduit with 10-inch outlet valve" and 18.52 cubic yards under item 9, "Concrete: Upstream and downstream cut-off and buttress footings." The unit price for the former was $20.00 per cubic yard, whereas the latter was $6.00 per cubic yard; that is, a total difference with respect to the 18.52 cubic yards of $259.28. The latter quantity was determined

by assigning to the latter classification all concrete which was poured in the base of the trench and 12 inches below the bottom of the interior bore of the conduit and the concrete above that quantity and surrounding the barrel of the conduit to the former classification. Payment was made to plaintiff on the basis of those classifications. Plaintiff contends that this classification of the concrete by the defendant's engineer was arbitrary and erroneous and that it is entitled to recover $20 per cubic yard for all concrete going into the construction of the conduit, making a balance of $259.28 due.

Paragraph 87 of the specifications provides that the defendant's engineer shall separate the concrete used in the construction of the dam for the purpose of payment therefor into the items named in the schedule. The evidence does not justify a finding that the engineer acted arbitrarily or capriciously in dividing the concrete used in the construction of the conduit into the two classifications stated, and in the absence of such a finding it must be assumed that he acted properly in assigning the 18.52 cubic yards to footing concrete and paying for the same under item 9 of the schedule.

Plaintiff further claims in this item that it is entitled to recover $1,273.60, alleged increased cost of special form work over that which would have been required under the original plans and specifications for the work. The findings show that the greater part of this form work was reasonably contemplated by the original plans and specifications and the evidence is not sufficient to support a finding that the changed line of the conduit and the taking of the conduit out of the trench and placing it on the top of the ground increased the form work required materially over what it would have been under the original plans and specifications. The plaintiff therefore is not entitled to recover in respect to this item of its claim.

4. Closure, $1,099.97.—It was necessary to make provision for the diversion of the water and care of the stream across which the dam was being built during the period of its construction. The original plans and specifications did not show in detail the manner in which the diversion of the stream

should be carried out during the construction of the dam or the manner in which closure of the openings of the dam through which the water had been diverted should be made upon its completion. The defendant requested plaintiff to furnish plans to close the openings left in the dam during its construction, and in response thereto plaintiff furnished the defendant three alternate types of closure. The defendant selected one of the types of closure proposed by plaintiff which, with minor modifications was incorporated in the general plans for the construction of the dam and used by plaintiff in carrying out the work. Openings in the dam for which the closure structures were required were between buttresses 32 and 33, and buttresses 33 and 34. In accordance with the closure plans suggested by the plaintiff and approved by the defendant, the closure structure was built by extending the lower portions of these buttresses upstream approximately 15 feet, and carrying out the face slab horizontally to form a roof or top over these extended portions of the buttresses, the buttresses thus forming two sides of the openings and the flattened or extended portion of the face slab forming the top. The height of the openings thus formed was approximately 8 feet. Grooves were provided in the extended portions of the buttresses so that when it came time to close the dam a timber gate was put into the grooves, thus closing off the water while concrete was poured to make the permanent closure.

Upon the completion of the work the defendant did not require the plaintiff to remove the closure structure, that is, the extended portions of the buttresses and the flattened or extended portion of the face slab which formed a roof for the opening. The plaintiff contended that these structures therefore form a permanent part of the dam and that it was entitled to payment at the unit prices in the contract for the concrete used in their construction, $363.20 for the face slab concrete and $395.76 for buttress concrete, together with $47.63 for the placing of 3,664 pounds of reinforcing steel in the concrete. The defendant refused to pay any portion of these sums and contended that plaintiff was obligated by the contract to perform all this work for the lump sum of $100.00. The defendant is clearly right in this contention.

Paragraph 57 of the specifications provides that—

> * * * The cost of furnishing all labor and materials and constructing and removing cofferdams, diverting the river, * * * and all other work required by this paragraph, except the placing of concrete in the diversion openings in the dam, shall be included in the lump-sum bid in the schedule for diversion and care of river during construction and unwatering of the foundations.

The plaintiff made a lump sum bid of $100 for this item of the work. (Item 1, schedule of prices.) The work was performed under plans suggested by plaintiff and approved by the defendant. Whatever the cost of the work to plaintiff may have been, and it was undoubtedly performed at a considerable loss, plaintiff's compensation for the work is definitely fixed by the contract at $100.00. Plaintiff has received payment of that amount and is entitled to nothing more. Likewise, for the reasons stated, plaintiff is not entitled to recover the sum of $293.38 on account of reinforcing steel and cement used in these structures which was furnished by the defendant. Plaintiff under the contract was obligated for the "cost of furnishing all labor and materials" used in the construction and removal of these structures. The defendant, having furnished these materials to plaintiff, was entitled to deduct their value from the amount due plaintiff under the contract. It therefore follows from what has been said that the plaintiff is not entitled to recover in respect to item 4 of its claim.

5. Resurfacing gate slab, $199.68.—The drawings required plaintiff to place upon the upstream face slab of the dam for each of three spillway gates a layer or slab of concrete 9½ inches thick upon which the rubber water-proofing members or sealing strips of the gates would travel while the gates were being lowered or raised. Plaintiff poured the concrete for the gate slab in strict accordance with the specifications, but when the slabs were completed and the concrete had set, it was found that the rubber sealing strips would not operate for the reason that there were certain high spots on the gate slab. The defendant's construction engineer in charge of the work instructed plaintiff to chip

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off the high spots and otherwise alter or fix the gate slab so the strips would operate, the engineer at the time stating that he would recommend payment for the cost of this work as extra work. The actual cost of the work to plaintiff was $199.68. Plaintiff has not been paid for this work. It was clearly extra work within the meaning of paragraph 13 of the specifications. It was ordered by the engineer in charge of the work and was necessary to complete the work. It was the duty of the engineer in charge of the work to make such payment to plaintiff on account thereof, as was reasonable and proper, as provided in the contract. The plaintiff having performed the extra work, and the defendant having received the benefit thereof, an implied contract exists on the part of the defendant to pay the reasonable value of the work even though the work was not performed under a written change order as provided in paragraph 14 of the specifications. Plaintiff therefore is entitled to recover on this item $199.68.

6. Balance due because of cost of use of excess cement, $6,377.90.—The contract provided that the Government should furnish the cement, but plaintiff was required to haul it from a distant railroad station to the site of the work, to unload it into storage houses, to handle it in the process of mixing, to then clean and care for the empty cement bags, to return such bags, and to pay for any loss on the bags. The contract further provided that the concrete should be of such a mixture as to procure certain stated strengths at the end of 28 days and that the mixes should be so designed as to not use excess cement. The defendant during the progress of the work specified the exact mixture of the concrete and the exact amount of cement to be used therein. The work on the dam commenced in November 1926. The defendant in February or March 1928, discovered that a large excess of cement was being used in the concrete and that the concrete it had been using was greatly in excess of the strength provided by the specifications. When plaintiff learned of this it protested to being required to use such excess amount of cement. The defendant, however, continued to use the same mixes of concrete throughout the remainder of the work. The Findings show that plaintiff was required to use 93,352

sacks of cement in excess of what it would have been required to use to produce concrete meeting all the requirements of the specifications. Plaintiff, on August 24, 1928, made a written demand for the payment of the cost of handling, hauling, and other operations incident to this excess cement. A more detailed statement and demand was filed by plaintiff on October 31, 1928, setting out an alleged increased cost of $9,858.67. The defendant in response to these demands frankly conceded that an excess amount of cement over that required in the contract had been used and that plaintiff was entitled to receive additional payment as a result thereof. In a letter to plaintiff, November 20, 1928, the defendant stated:

> The quantity of cement per cubic yard of concrete used in construction of Stony Gorge Dam was about 12.75% more on the average than the amount contemplated, or more than would have been used in the proportions mentioned in paragraph 67 of the specifications, the excess being calculated at 28,286 sacks. This is considered a change of plans and, as provided in paragraph 13 of the specifications, the contractor is entitled to receive an additional payment on this account, equivalent to the consequent increase in costs.

Plaintiff at this time was allowed the additional sum of $2,634.69 as the cost of handling excess cement, the excess being calculated by the defendant as 28,286 sacks. Plaintiff protested this allowance and on November 1, 1930, submitted an appeal for reconsideration in which a revised computation of its claim was set out showing the excess quantity of cement used was 93,352 sacks. Upon reconsideration of the matter plaintiff's allowance for the cost of handling the excess cement was increased to $6,588.58, calculated on the basis of the excess use of 74,725 sacks of cement. This amount was paid to plaintiff on final settlement and accepted by it, under protest, with the express reservation of the right to prosecute a claim for the greater amount claimed to be due.

The cost to plaintiff of handling the excess cement used in the construction of the dam, including 15 percent as a reasonable amount for profit, superintendence, and general expenses incident thereto, as provided in paragraph 14 of the specifications, was $12,966.48. The decision of the defend-

ant's engineer that the cost of the work was only $6,588.58 was therefore grossly erroneous and was not final or binding on plaintiff. Plaintiff is entitled to recover $6,377.90 with respect to this item of its claim.

Upon the whole case the plaintiff is entitled to recover the sum of $50,728.04, and judgment will be entered accordingly.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

PHILIP F. GORMLEY, TRADING AS P. F. GORMLEY COMPANY v. THE UNITED STATES

[No. 42437. Decided March 7, 1938. Motion for new trial overruled July 5, 1938.]

On the Proofs

Government contract; alterations made without consent of plaintiff.—Held not binding upon him under circumstances of the case.

Same; execution of contract.—Where contract with the Government has been reduced to writing, and signed by the contracting parties, and work in accordance with its terms has been commenced, it is held that it was intended and understood that the contract was in full force and effect.

Same; failure to reply to letter.—Where the Government notified contractor by letter of proposed changes in contract, and no reply was made, it is not material whether or not letter was received.

The Reporter's statement of the case:

Mr. John W. Gaskins, for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. On March 2, 1917, the Chief of the Bureau of Yards & Docks, Navy Department, accepted plaintiff's bid of January 29, 1917, for the construction and completion of a structural shop building at the Navy Yard, Philadelphia, Pennsyl-

vania, at various unit prices, the one here material being $106 per ton for structural steel, so notified the plaintiff and informed him that form of contract would be prepared and forwarded to him for execution as soon as practicable. Based on the total amount of the bid the item of structural steel amounted to approximately 48% of the work.

In preparing his bid, plaintiff had secured prices from various sources for labor and material and had added thereto a margin for overhead and profit. The price of $106 per ton bid by him on the structural steel plaintiff had calculated as affording him thereon such overhead and profit.

2. The bid price of $106 per ton on structural steel was arrived at by plaintiff in the following manner:

Shortly after advertisement for bids J. B. Bonner, who was vice chairman of the Sub-committee on Steel Distribution of the American Iron & Steel Institute and a representative of the Carnegie Steel Company, solicited of plaintiff the business of furnishing and erecting the structural steel in the event that plaintiff was awarded the contract, and quoted to plaintiff a price of $90 a ton erected and in place. Bonner urged plaintiff to place an order for the structural steel with the American Bridge Company at $106 and if that were done promised that he, Bonner, would see that plaintiff was reimbursed the difference of $16 a ton. This arrangement plaintiff agreed to. The Carnegie Steel Co. and American Bridge Co. were subsidiaries of the United States Steel Corporation. The United States Steel Corporation was a holding company, the Carnegie Steel Company a rolling mill, and the American Bridge Company a fabricating and erecting concern. The structural steel required in this case had to be fabricated and erected.

Pursuant to this arrangement the American Bridge Company on January 27, 1917, proposed to the plaintiff in writing to furnish and erect the structural steel in question for $106 per net ton. The plaintiff thereafter, January 29, 1917, bid on this item $106 per ton, which bid was accepted March 2, 1917, as related in Finding 1.

3. By March 3, 1917, partial plans for the design of the structural steel, prepared by the American Bridge Co., had been submitted by the plaintiff to the Bureau of Yards &

Docks, at that time were being checked by the Bureau, and the Bureau was requesting of the plaintiff further details of design.

4. On March 10, 1917, plaintiff signed a form of contract that had been forwarded to him by the Bureau of Yards & Docks, which named, under item 14 thereof, in conformity with the accepted bid, $106 per ton for structural steel, reading as follows: "Item 14, for structural steel, one hundred and six dollars ($106.00) per ton", and together with duly executed bond for performance in the sum of $182,409.53, in which the Fidelity & Deposit Company of Maryland appeared as surety, immediately delivered it to the Bureau of Yards & Docks.

The Bureau of Yards & Docks the same day forwarded the form signed by plaintiff to the secretary's office for signature, and it was signed by Acting Secretary of the Navy F. D. Roosevelt March 13, 1917, with bond approved, and returned March 13, 1917, to the Bureau of Yards & Docks.

5. Plaintiff commenced work on the contract the same day he signed it and so notified the defendant. From that time on the work was prosecuted continuously except for excusable delays. It was intended by the parties that the contract should be in full force when signed by the Secretary of the Navy or his assistant.

During the period March 10, 1917, to April 4, 1917, inclusive, the plaintiff entered into several subcontracts, exclusive of any contract with the American Bridge Co., for labor and material to be performed under the prime contract, under which payments were eventually made by plaintiff in the aggregate sum of $97,242.64.

On April 3, 1917, plaintiff sent the following letter to the American Bridge Co.:

> We hereby accept your proposal to furnish and erect the structural steel required by the plans and specification for the Structural Shop, Navy Yard, Philadelphia, Pa., showing what is known as the "Aiken" type of roof, for the sum of One Hundred and Six Dollars ($106.00) per ton.
>
> Formal contract, satisfactory to both parties, will be forwarded to you.

The American Bridge Co., referring to this acceptance, wrote to the plaintiff on April 4, 1917, the following:

> I am in receipt of your order dated April 3rd, for furnishing structural steel for Structural Shop, Navy Yard, Philadelphia, Pa., using Aiken type of roof.
>
> Thanking you for the same, we remain, etc.

6. On or about April 6, 1917, J. A. Farrell, president of the United States Steel Corporation, representing the United States Steel Corporation and its subsidiaries, agreed with the Secretary of the Navy, Josephus Daniels, after negotiations therewith, to furnish steel for Navy construction at certain maximum prices. At that time structural steel was in great demand, due to war activities, prices thereon were on the upward trend, and high prices would be reflected in bids for naval construction work, such as the project here involved. The Navy Department desired to have the advantage of these maximum prices on work let to contractors.

A program under this agreement was decided upon between the Bureau of Yards & Docks, and the aforesaid J. B. Bonner, representing for that purpose the United States Steel Corporation and its subsidiaries, and generally put in operation as follows:

> When it is decided that it will be to the Government's advantage to purchase material at the special Government price, Mr. Bonner is so informed, stating the contract, the contractor, the work, the location of same, required point of delivery of material, required date of delivery of material, tonnage and percentage of plates, shapes, and bars. Mr. Bonner then informs the Bureau that arrangements have been made with a certain mill to furnish the specified material to the contractor at the special Government price. The Bureau then directs the contractor to place his orders direct with the mill stated. If necessary, the contract price is adjusted to provide for payment for material at the special Government price.

7. Pursuant to the agreement between J. A. Farrell and Secretary Daniels, the American Bridge Co., on April 11, 1917, without being prompted thereto by the plaintiff communicated with plaintiff as follows:

> In accordance with our agreement with the Navy Department in relation to their purchase of structural steel,

we hereby quote you a revised price of Ninety-eight Dollars ($98) per net ton for the structural steel entering into the Structural Shop, Navy Yard, Philadelphia.

Will you kindly send us revised order covering this material at this price.

The Bureau of Yards & Docks will undoubtedly take up with you the adjustment of your contract.

8. The plaintiff immediately upon receipt of this communication conferred with the Chief of the Bureau of Yards & Docks, Admiral F. R. Harris, with reference to the revised price on steel. The plaintiff protested to Admiral Harris against reduction in his contract price. Admiral Harris told plaintiff that if a change in the contract reducing the price in accordance with the agreement with the steel interests was not agreeable to plaintiff, he would take the contract from him, and readvertise the same. Admiral Harris expressed the opinion that the price plaintiff had quoted to the Government left him practically no profit, and tried to prevail on him to give up the job. Plaintiff insisted that he could make money and that he did want the job. Admiral Harris told him that it was a case of reduction or readvertisement, but nothing definite was agreed upon.

9. On April 14, 1917, Admiral Harris addressed the following letter to the plaintiff:

> Referring to the recent award of contract to you for Structural Shop at the Navy Yard, Philadelphia, and referring further to recent conferences with you concerning prices to be paid for steel entering into this contract, you are informed that contract to be drawn covering this work will be modified so as to provide for payment for structural steel entering into the same at the rate of $98 per ton instead of the price bid therefor by you; and further, the price for reinforcing steel will be reduced by an amount equivalent to the difference between the price secured by you at the time of the preparation of the bid and the price which the Government is now able to secure.
>
> Please be governed accordingly.

The price for reinforcing steel referred to is not involved in this suit.

The letter was not received by the plaintiff and plaintiff did not reply thereto.

Reporter's Statement of the Case

On April 23, 1917, Admiral Harris again addressed to plaintiff a letter as follows:

> Referring to proposed contract No. 2304 with you for the construction of a structural shop at the Navy Yard, Philadelphia, Pa., which was executed by you on the 10th of March 1917 and which was further accompanied by a bond with the Fidelity & Deposit Company of Maryland dated also the 10th day of March 1917, you are informed that it is proposed to change the provisions of this contract as follows, these changes being made for the purpose of avoiding re-drafting the contract to meet the conditions referred to in the above-referenced letter [letter of April 14, 1917]:
>
> Under the 10th clause of the proposed contract, under item 14, the compensation to be paid for structural steel will be changed from $106 per ton to $98 per ton; and further an additional clause will be added to the contract reading as follows: "It is further agreed and understood that the party of the second part reserves the right to modify the compensation provided in Item 15, of the 10th clause hereof in such manner as to obtain a credit based on the difference between the quotation obtained by the party of the first part at the time of preparation of the proposal for the work covered by this contract and the cost of such reinforcing steel which may be obtained by the party of the second part."
>
> Please inform the Bureau immediately of your approval of these proposed changes, and further obtain in writing the consent of your surety to these changes, and forward a copy of such consent to the Bureau.

This letter was not received by the plaintiff. The plaintiff did not reply thereto and did not at any time express a consent to the proposed changes, or request or obtain from the surety its consent to the changes.

Sometime between April 23, 1917, and May 3, 1917, the surety company on the bond forwarded to the Bureau of Yards & Docks, and the bureau received the following consent:

> The Fidelity and Deposit Company of Maryland, surety upon a certain bond, dated the 10th day of March, A. D. 1917, in the penalty of One Hundred and Eighty-two Thousand Four Hundred and Nine and 53/100 Dollars ($182,409.53), on behalf of P. F. Gormley, in

> favor of the United States of America, and conditioned for the performance of a contract for the erection of a Structural Shop at the Navy Yard, Philadelphia, does hereby give its consent to changes in said contract as set forth in a letter dated April 23, 1917, copy of which is hereto attached and signed by the Fidelity and Deposit Company of Maryland for the purpose of identification, and that its said bond shall apply accordingly.

Thereupon, over the signatures of the parties signing as related in Finding 4, an officer in the Bureau of Yards & Docks, without authority to contract for the Government, changed or caused to be changed item 14 by erasing the words "one hundred and six dollars" and writing in their stead the words "ninety-eight dollars," so that item 14 read: "Item 14, for structural steel, ninety-eight dollars ($106.00) per ton," and added the clause, not here material, set out verbatim in Admiral Harris' letter of April 23, 1917.

After the changes had been made a copy of the contract was on May 4, 1917, delivered to the plaintiff, showing the changes, and it is attached to the petition in this case as plaintiff's Exhibit "A" and made part hereof by reference.

The original date of the contract was March 10, 1917, on which date plaintiff executed it on his part and delivered it to the defendant. This date was not changed.

10. With reference to plaintiff's contract the Bureau of Yards & Docks on May 9, 1917, sent the original of the following letter to the plaintiff, and a copy thereof each to J. B. Bonner, to the Navy Yard at Philadelphia, and to the Bureau of Supplies & Accounts, Navy Department.

> In order to expedite the delivery of structural steel on above contract, it is requested that you place your orders for this material, amounting approximately to 3,400 tons of structural steel and 40 tons of reinforcing steel, direct with the American Bridge Company, without having the same go through the Bureau.

On May 19, 1917, plaintiff sent the following letter to the American Bridge Co.:

> We herewith hand you revised acceptance to furnish and erect the structural steel required by the plans and specifications for the Structural Shop, Navy Yard,

Philadelphia, Pa., showing what is known as the "Aiken" type of roof for the sum of Ninety-Eight Dollars ($98.00) per ton.

This is in accordance with the revision of price for steel as set by the Department. It is also understood that the deliveries will be made satisfactory to us. The formal contract will be forwarded you for execution within the next day or two.

Formal contract between American Bridge Co. and the plaintiff was thereafter entered into, naming the price of $98 per net ton on structural steel, and was dated March 12, 1917.

This contract between American Bridge Co. and the plaintiff was performed according to its terms.

11. The prime contract provided that the work was to be completed within 280 calendar days from the date a copy thereof was delivered to the contractor. This set the date for completion on or before February 8, 1918. The work was greatly retarded, due to no fault upon the part of the contractor, and was finally completed together with changes December 31, 1919, and the time for completion was extended to that date.

There were furnished and erected 3,957.346 net tons of structural steel, and for the same plaintiff has been paid by the defendant $387,819.91, which is at a rate of $98 per net ton. At a rate of $106 a net ton the price would be $419,478.68, a difference of $31,658.77.

12. On March 25, 1921, plaintiff executed a release to the defendant of claims arising out of the contract here involved, except the claim here in suit, stated in the release as not exceeding $32,000.00, specifically excepting and reserving the same from the operation of the release, and the balance finally conceded to be due was paid on or about September 2, 1931, leaving the claim here sued on reserved and unreleased.

The claim set forth in the petition of $26,034.12 for extra costs has been withdrawn by the plaintiff.

The court decided that the plaintiff was entitled to recover.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

This action is begun pursuant to a joint resolution of Congress approved March 4, 1933, reading as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States, notwithstanding the lapse of time or any statute of limitations, to hear the claim of P. F. Gormley Company for payment at the contract price of $106 per ton for structural steel furnished and used in the performance of its contract numbered 2304 with the Navy Department, dated March 10, 1917, for construction of structural shop building at the navy yard, Philadelphia, Pennsylvania, for such amount as will equitably compensate said company for said steel not in excess of the price aforesaid; and also claims for damages or extra costs occasioned by orders of the Navy Department requiring the contractor to pay wages at rates fixed by war-time wage boards; by the commandeering of contractor's labor for use on war-time work considered more urgent; for increased costs due to extended period of performance necessitated by war-time conditions and war orders, with the right on the part of the Government to present any legal and equitable set-offs and defenses and to render findings of fact, and upon such findings of fact to render judgment, but without any allowance for interest on the determined amount for damages prior to its rendition.

It appears that plaintiff entered into a contract for the construction of a building and that the contract provided that plaintiff should be paid $106 per ton for the structural steel erected and used therein. After the contract had been signed by plaintiff and by the Acting Secretary of the Navy, it was altered by one of the defendant's officials and when the contract was completed the plaintiff was paid only in accordance with the alteration which fixed the price at $98 per ton for the structural steel, and not in accordance with the contract as originally executed.

The defense set up is that the alteration was made before delivery of the contract and that defendant's officials had a right to change the same. It is also alleged that plaintiff consented to the alteration.

The findings show that on March 2, 1917, the Chief of the Bureau of Yards and Docks, Navy Department, accepted a bid of plaintiff for the construction and completion of a structural shop building at the Navy Yard at Philadelphia, at various unit prices, the one here material being $106 per ton for structural steel. Plaintiff made this bid on structural steel for the reason that he had an understanding with one J. B. Bonner, who was vice chairman of the Subcommittee on Steel Distribution of the American Iron & Steel Institute and a representative of the Carnegie Steel Company, and who solicited the order for erecting the structural steel, that the cost to plaintiff of this material would be $90 a ton erected and in place. Bonner urged plaintiff to place an order for the structural steel with the American Bridge Company at $106 and if that was done promised that he, Bonner, would see that plaintiff was reimbursed the difference of $16 a ton. This arrangement plaintiff agreed to. It does not appear that Bonner was legally authorized to make such an agreement. The Carnegie Steel Company and the American Bridge Company were subsidiaries of the United States Steel Corporation. The United States Steel Corporation was a holding company, the Carnegie Steel Company a rolling mill, and the American Bridge Company a fabricating and erecting concern. Pursuant to this arrangement the American Bridge Company on January 27, 1917, proposed to the plaintiff in writing to furnish and erect the structural steel in question for $106 per net ton.

On March 10, 1917, plaintiff signed a form of contract which had been forwarded to him by the Bureau of Yards and Docks in which the price of $106 per ton for structural steel was fixed in conformity with the accepted bid, and the contract together with the bond required was delivered to the Bureau of Yards and Docks.

The Bureau of Yards and Docks the same day forwarded the contract to the Secretary's office for signature and it was signed by the Acting Secretary of the Navy, March 13, 1917, with bond approved and returned the same day to the Bureau of Yards and Docks.

Opinion of the Court

Work under the contract was commenced by the plaintiff March 10, 1917, and from that time on, with the knowledge of defendant, was prosecuted continuously except for necessary delays.

About April 6, 1917, the president of the United States Steel Corporation agreed with the Secretary of the Navy after some negotiations to furnish steel for Navy construction at certain maximum prices, and April 11, 1917, the American Bridge Company notified the plaintiff that in accordance with an agreement with the Navy Department they quoted a revised price of $98 per ton for the structural steel entering into the building to be constructed by him. The plaintiff immediately thereafter conferred with the Chief of the Bureau of Yards and Docks, Admiral Harris, and protested against any reduction in his contract price. Plaintiff was told by Harris that if the change was not agreeable to him he [Harris] would take the contract from him and readvertise it and tried to prevail on plaintiff to give up the job, but plaintiff said he wanted it and nothing definite was agreed upon. On April 14, 1917, Harris wrote the plaintiff a letter among other things stating that the contract would be modified so as to pay for the structural steel at the rate of $98 per ton instead of the price bid by him. The letter was not received by plaintiff and he did not reply thereto.

On April 23, 1917, Harris wrote again to the plaintiff with reference to the contract, stating among other things, that "it is proposed to change the provisions of this contract * * * the compensation to be paid for structural steel will be changed from $106 per ton to $98 per ton." This letter was not received by the plaintiff and the plaintiff did not at any time express a consent to the proposed changes or request or obtain from the surety its consent to the changes. The surety company, however, did forward to the Bureau of Yards and Docks a written consent to the changes and thereafter an officer in the Bureau of Yards and Docks, without authority to contract for the Government, changed or caused to be changed the contract by erasing the words "one hundred and six dollars" and writing in their stead

"ninety-eight dollars" so that Item 14 read: "Item 14, for structural steel, ninety-eight dollars ($106.00) per ton." After these changes had been made a copy of the contract was on May 4, 1917, delivered to the plaintiff showing the changes. The original date of the contract, March 10, 1917, was not changed.

On May 9, 1917, the Bureau of Yards and Docks sent a letter to plaintiff and a copy thereof each to J. B. Bonner, to the Navy Yard at Philadelphia, and to the Bureau of Supplies & Accounts, Navy Department, in which plaintiff was requested to place his orders for structural steel required by the contract direct with the American Bridge Company. Later, a contract was entered into between the American Bridge Company and the plaintiff for the structural steel required at the price of $98 per ton. It was dated March 12, 1917.

It is argued on behalf of defendant that it had the right to change the contract any time before delivery and in support of this contention *Ligon* v. *Wharton*, 120 S. W. (Tex.) 930, 933, and Page on Contracts are cited. This may be the general rule, especially in relation to deeds, but there are many exceptions. In the case before us the plaintiff's bid was accepted with the understanding that a written contract would be prepared by the defendant and delivered to plaintiff to be signed. The plaintiff signed the contract and returned it to be signed on behalf of the defendant which was done. The contract recited that it was "made and concluded this tenth day of March, A. D. 1917." This expression is somewhat stronger than the words "made and executed" which were held in *Elbring* v. *Mullen*, 4 Ida. 199, to import a delivery. In *Weaver* v. *Simmon*, 15 Tex. Civ. Ap. 154 (38 S. W. 1140) it is held that a delivery is not necessary when the parties have entered into mutual engagements with the understanding that they are to be immediately effective and have caused such engagements to be reduced to writing and signed as evidence thereof. The evidence as a whole shows a similar case here. The Federal statute requires every contract made by the Secretary of the Navy "to be reduced to writing, and signed by the contracting parties with their names at the end thereof." This provision is strictly en-

forced and we think that when it has been complied with the contract has been executed in accordance with law. The statute also requires a copy of the contract to be filed with the Department of the Interior but this provision does not affect the validity thereof. At the time the contract was executed the National Defense Act of June 3, 1916, was in force and under this statute orders for war material took precedence over all other orders and contracts. The Naval Appropriation Act of March 4, 1917, contained a similar provision. Plaintiff also about April 3, 1917, contracted with the American Bridge Company for the structural steel required at the price of $106 per ton and from March 10, 1917, to April 4, 1917, entered into other subcontracts for labor and material to be performed under the prime contract, under which payments were eventually made by the plaintiff in the aggregate sum of $97,242.64. Immediately on the signing of the contract by the Secretary of the Navy, the plaintiff commenced work in accordance therewith and prosecuted it continuously to completion. Defendant was notified of the commencement of the work.

In *Sarasohn* v. *Kamaiky*, 193 N. Y. 203, it was said that any evidence that shows that the parties to a written instrument intended the same should be operative and binding upon them is sufficient in an action to enforce its provisions.

The action of the plaintiff in commencing the work as soon as the contract was signed and the prosecution thereof with defendant's knowledge, the efforts of defendant's officials to get plaintiff to agree to a change in the contract and all the circumstances of the case, we think show that it was intended and understood that the contract was in full force and effect when signed by both parties and was immediately to go into effect.

The contract was changed by defendant sometime between April 23 and May 3, 1917. Under the circumstances detailed above, we think the defendant had no right to make the change unless it was assented to by the plaintiff. The defendant contends that the plaintiff did make such an agreement in a conference with Admiral Harris about April 11, 1917, but we think it is shown by the letters which Harris subsequently wrote that nothing definite was agreed upon

at the time of this conference. The plaintiff denies receiving the letters which Harris wrote shortly after the conference. We think it is immaterial whether or not he received them, for he made no answer to them and we have found that he did not agree to the change. In this connection it will be noted that the first of these letters stated that the contract "will be modified so as to provide for payment for structural steel entering into the same at the rate of $98 per ton;" and a second letter stated "it is proposed to change the provisions of this contract," as stated in the first letter. (See Finding 9.) He was also requested in these letters to inform the Bureau of his "approval of these proposed changes" and to obtain in writing the consent of his surety thereto. While the surety did agree to the change, the evidence fails to show that this consent was solicited by plaintiff.

The defendant contends that the testimony of the plaintiff as to his conversation with Bonner, who at the time of the trial was deceased, is not competent. The testimony as to what Bonner told plaintiff, if admissible at all, is as part of the *res gestae* in the way of explanation of why plaintiff was willing in the first instance to agree to pay $106 per ton for the structural steel when it could be bought for much less. But in view of the fact that plaintiff subsequently made a second agreement with the American Bridge Company to pay only $98 per ton, we do not think this is material, and in any event it is not necessary to plaintiff's case.

The plaintiff furnished and erected 3,957.346 net tons of structural steel for which he was paid at the rate of $98 per ton, receiving $31,658.77 less than would have been paid him in accordance with the terms of the contract as originally signed. The alteration in the contract being unauthorized, the plaintiff is entitled to recover the sum last named above, and judgment will be rendered accordingly.

Whaley, *Judge;* Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

ROBERT E. HOGABOOM v. THE UNITED STATES

[No. 42461. Decided March 7, 1938]

On the Proofs

Rental allowance, second lieutenant, U. S. Marine Corps with Nicaraguan National Guard; service without troops.—A second lieutenant of the U. S. Marine Corps, serving pursuant to the Act of May 19, 1926, as a captain in the National Guard of Nicaragua, a police force, to instruct, recruit, and train the force, was on duty without troops, was not on field duty and was entitled to rental allowance in accordance with the Act of June 10, 1922, no public quarters being available. Decided on the authority of *Beadle* v. *U. S.* 72 C. Cls. 310.

The Reporter's statement of the case:

Mr. Rees B. Gillespie and *Mr. John W. Price* for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiff sues to recover $1,370.67 under the Act of June 10, 1922, as amended by the Act of May 31, 1924; the Act of May 19, 1926, 44 Stat. 565, and an Executive Order of the President of August 13, 1924, defining the term "Field Duty."

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

The plaintiff, a bachelor officer without dependents, served with the National Guard of Nicaragua from August 5, 1927, to January 1, 1930. During this period of service he was a Second Lieutenant in the Marine Corps. The plaintiff held a commission as a Captain in the National Guard of Nicaragua.

The Headquarters of the National Guard of Nicaragua was at Managua, Nicaragua. Colonel Beadle and Colonel McDougal were in command of the National Guard of Nicaragua during the period the plaintiff served with such organization.

The National Guard of Nicaragua was an organization foreign to all political influences designed to maintain social

order in the triple capacity of an urban, rural, and judicial police force. It was organized in a military fashion to the end that it might function as an effective police force in the maintenance of peace, law, and order. The organization was composed entirely of Nicaraguans except such officers as were detailed to it as instructors.

There were no public quarters available in Nicaragua during the plaintiff's assignment there. He rented at his own expense quarters which cost him from $35 to $50 a month.

The National Guard of Nicaragua was the national police force of Nicaragua. It policed both the cities and country districts and the plaintiff served as an instructor, recruiter, and trainer of these national policemen. The plaintiff served in Nicaragua without troops. He was at no time engaged in combat with an enemy, actual or potential.

If, under the facts found as above, plaintiff is entitled to recover, the amount due him for the rental allowances authorized by law is $1,370.67.

The court decided that the plaintiff was entitled to recover.

PER CURIAM: The plaintiff, who was a second lieutenant in the Marine Corps, and was without dependents, served with the National Guard of Nicaragua from August 5, 1927, to January 1, 1930. The National Guard was an organization foreign to all political influences and was designed to maintain social order in the triple capacity of an urban, rural, and judicial police force. It was organized in a military fashion to the end that it might function as an effective police force in maintaining peace, law, and order. The organization was composed entirely of Nicaraguans, except such officers as were detailed to it as instructors.

There were no public quarters available in Nicaragua during the plaintiff's detail there. He rented quarters at his own expense at $40 a month.

During the period of plaintiff's service the Nicaraguan National Guard was under the command of Colonel Beadle and Colonel Rhea. The plaintiff served as an instructor, recruiter, and trainer of the National Guard, which was the

National Police Force of Nicaragua. He served without troops and at no time was he engaged in operations against an enemy, actual or potential. In these circumstances this case is controlled by the decision in this court of *Beadle* v. *United States*, 72 C. Cls. 310, in which the same statutes, Executive Order, and substantially the same facts were involved. On the authority of the decision in that case plaintiff is entitled to recover and judgment will be entered in his favor for $1,370.67. It is so ordered.

THE BALTIMORE COUNTY BANK, A CORPORATION, v. THE UNITED STATES

[No. 42508. Decided March 7, 1938]

On the Proofs

Income and profits tax; failure to file claim for refund within four years of payment of tax.—Whether a deficiency assessment of income and profits taxes was made and collected within the time permitted by statute or not, where a claim for refund was not filed within four years after payment of any part of the taxes, the taxpayer was not entitled to the refund and the claim was properly disallowed.

The Reporter's statement of the case:

Mr. Francis R. Lash for the plaintiff.

Messrs. Robert N. Anderson, Fred K. Dyar, and *John A. Rees*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is now, and at all times material hereto and hereinafter mentioned was, a domestic corporation organized and existing under the laws of the State of Maryland, engaged in the general banking business, having its principal office and place of business at Towson, Maryland.

2. On March 2, 1921, plaintiff filed with the collector of internal revenue for the district of Maryland its corporation income and profits tax return for the calendar year 1920, which reported a total tax liability of $252.14, which amount was paid March 4, 1921.

3. Subsequently a revenue agent audited the return, together with plaintiff's books of account and records and prepared his report thereon under date of October 9, 1924. The office of the Commissioner determined an additional tax to be due for 1920 in the amount of $1,455.94, of which it notified plaintiff by thirty-day letter under date of March 27, 1925.

4. On May 7, 1925, plaintiff filed its protest. A supplemental report was submitted by the revenue agent. On July 9, 1925, the Commissioner of Internal Revenue mailed plaintiff a so-called sixty-day letter reading in part as follows:

> The determination of your tax liability for the years 1920 to 1922, inclusive, discloses a deficiency in tax for the year 1920 amounting to $1,455.94 and overassessments for the years 1921 and 1922 totaling $318.41, as shown in office letter of March 27, 1925.

On September 5, 1925, plaintiff filed with the United States Board of Tax Appeals a petition appealing the Commissioner's determination of its tax liability for the taxable year 1920.

5. No hearing was ever had before the Board of Tax Appeals of plaintiff's appeal but the parties thereto, acting by and through their respective counsel, agreed that the Board of Tax Appeals should render its decision therein, redetermining the deficiency in such case to be $1,455.94.

Counsel for the parties thereupon executed a written stipulation and filed same with the Board of Tax Appeals on November 3, 1926. On November 3, 1926, the Board of Tax Appeals rendered its decision redetermining the deficiency for the taxable year 1920 to be $1,455.94.

6. The stipulation and decision referred to in the preceding finding read, respectively, as follows:

STIPULATION

> It is hereby stipulated by and between the parties hereto by their respective attorneys that the deficiency in tax of the above-named petitioner for the calendar year 1920 is $1,455.94, and that an order of redetermination may be entered accordingly.

Reporter's Statement of the Case

ORDER OF REDETERMINATION

This proceeding having been called from the Day Calendar of November 3, 1926, and counsel for the parties having filed a stipulation stating the amount of deficiency due from this petitioner, it is

Ordered and decided that there is a deficiency for the year 1920 in the amount of $1,455.94.

The deficiency determined as aforesaid, together with interest thereon of $84.14, in the total sum of $1,540.08, was assessed upon a list signed by the Commissioner of Internal Revenue on February 12, 1927. The remarks column upon that list carried the following notation:

"1920 400262
"SEC 274B RAR
"OL 7/9/25"

7. On February 19, 1927, the Commissioner of Internal Revenue allowed overpayments of $218.28 and $100.13 for the years 1921 and 1922, respectively, in the sum of $318.41, and applied this amount as credits to the assessment mentioned in finding 6 above. On April 5, 1927, plaintiff addressed a letter to the Commissioner of Internal Revenue, reading as follows:

We are in receipt of the above letters from your department relative to allowance of overassessment for the years 1921 and 1922. In a bill sent from your department dated April 1, 1927, we are charged with a tax of $1,455.94 for 1920, with interest of $84.14, totaling $1,540.08. There is a credit of the above amounts, viz: $218.28 and $100.13. In allowing these credits, we note no correspondent interest allowance as in the tax interest charge.

As soon as possible, let us know, as we have been informed that interest on these items should also be given as credits to us.

Thanking you for your trouble, and as soon as we receive your reply, we will settle entire claim.

The remaining balance of that same assessment, namely, $1,221.67, was, pursuant to notice and demand dated May 5,

1927, paid by the plaintiff to the collector of internal revenue on May 12, 1927.

8. On August 5, 1927, the Commissioner's office refunded to the plaintiff $18.34 as an excess collection of interest assessed on the list dated February 12, 1927.

9. On May 29, 1931, plaintiff filed with the collector of internal revenue at Baltimore, Maryland, its claim for refund of the total deficiency tax and interest collected as aforesaid, for the calendar year 1920, in the sum of $1,540.08. Its claim set forth as grounds that the assessment and collection had been made at a time when they were prohibited or not permitted, by the provisions of sections 274 (a) (b) (h); 277 (a) (3); and 283 (a) (b) of the Revenue Act of 1926. Plaintiff's claim for refund was disallowed by the Commissioner of Internal Revenue on a schedule dated September 11, 1931.

The court decided that the plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff seeks recovery of $1,540.08, with interest, an alleged overpayment of its income and profits taxes for the calendar year 1920. Suit is predicated on the disallowance by the Commissioner of Internal Revenue of plaintiff's claim for refund, which sets forth as grounds for the refund that the assessment and collection of the challenged taxes had been made at a time when they were prohibited, or not permitted, by law. The relevant facts disclose that—

Plaintiff filed its income and profits tax return for the calendar year 1920 on March 2, 1921, reporting a tax liability of $252.14, which amount was paid and is not now in controversy.

On July 9, 1925, the Commissioner of Internal Revenue mailed to plaintiff a so-called sixty-day letter proposing a deficiency of $1,455.94 for 1920 and overassessments for the years 1921 and 1922 totaling $318.41.

On September 5, 1925, plaintiff filed an appeal for the year 1920 with the United States Board of Tax Appeals.

Opinion of the Court

No hearing was had before the Board on the appeal, the parties thereto, by their respective counsel, having stipulated in writing that there was a deficiency in plaintiff's tax liability for the year 1920 of $1,455.94, and that an order of redetermination might be entered accordingly, which order was subsequently, on November 3, 1926, entered by the Board.

The deficiency of $1,455.94, together with interest thereon of $84.14, making a total of $1,540.08, was assessed by the Commissioner of Internal Revenue on February 12, 1927. The deficiency so assessed by the Commissioner was paid in the following manner:

The Commissioner, on February 19, 1927, credited the overpayments of $218.28 and $100.13 for the years 1921 and 1922, respectively, amounting to $318.41, against the said deficiency, and the balance, $1,221.67, was paid by plaintiff in cash on May 12, 1927.

Plaintiff's claim for refund was filed with the collector on May 29, 1931, and disallowed by the Commissioner of Internal Revenue on September 11, 1931.

Whatever the merits of plaintiff's claim that the taxes in controversy were assessed and collected at a time when they were prohibited, or not permitted, under the statute, may be, it is clear that plaintiff can not recover for the reason that its claim for refund was not filed within four years after payment of any part of the taxes involved as was required by the provisions of Section 3228 of the Revised Statutes, as amended by Section 1112 of the Revenue Act of 1926 (44 Stat. 115; 26 U. S. C. A., Sec. 1433). This fact fully justified the Commissioner's action in disallowing the claim and is a bar to plaintiff's right of recovery here. The court is without jurisdiction to hear and determine the suit and the petition is therefore dismissed.

Whaley, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

Reporter's Statement of the Case

CITY BANK FARMERS TRUST COMPANY, A CORPORATION, MARGARET H. CARRINGTON, WILLIAM J. WOODS, AND EDWIN A. FISH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM T. CARRINGTON, DECEASED v. THE UNITED STATES

[No. 42899. Decided March 7, 1938]

On the Proofs

Income tax; bad debt deduction; evidence sustained.—Finding of Commissioner of the Court affirmed that taxpayer properly ascertained in 1929 that loans made in 1927 and 1928 were worthless, and held to entitle executors of taxpayer's estate to recover overpayment, with interest, resulting from refusal of Internal Revenue Commissioner to allow bad debt deduction for 1929.

Same; failure to include deduction satisfactorily explained.—Where taxpayer, who did not keep books of account, informed agent who was preparing 1929 income tax return that certain loans were a total loss and that taxpayer wanted them deducted on the return, but agent failed to claim the deduction, contrary to taxpayer's instructions, the executors of the taxpayer's estate were entitled to make claim for refund, since failure to include the deduction in the return was fully explained. *Peters* v. *U. S.* 80 C. Cls. 830.

The Reporter's statement of the case:

Mr. George H. Craven for the plaintiffs. *Messrs. Charles Angulo*, *Russell L. Bradford*, and *Taylor*, *Blanc*, *Capron & Marsh* were on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiffs, City Bank Farmers Trust Company, a corporation, Margaret H. Carrington, and Edwin A. Fish, are citizens of the United States and are the duly appointed, qualified, and acting surviving executors of the last will and testament of William T. Carrington, deceased, who died on May 4, 1931, a resident of Greenwich, Connecticut. Wil-

liam J. Woods, who was one of such executors and one of the plaintiffs, was a citizen of the United States and died on December 26, 1936.

2. The decedent, William T. Carrington, duly filed his Federal income tax return for the calendar year 1929 on March 15, 1930, showing net taxable income of $110,281.26 and a tax due thereon of $16,304.36 which was duly paid in four installments of $4,076.09 each on March 15, June 16, September 13, and December 15, 1930. The return was filed with and the tax paid to the United States Collector of Internal Revenue for the Second District of New York. The return was executed by one William J. Woods, an agent for the decedent, and did not include as a deduction the sum of $89,000.00 claimed by the plaintiffs as a bad debt deduction for that year, as referred to below, nor the sum of $2,860.70 which subsequently was allowed as a deduction from dividends received because it was distributed from the depletion reserves of the corporation from which received.

3. On March 11, 1932, the plaintiffs duly filed their claim for refund of taxes paid by the decedent for the year 1929, in which they demanded a refund of $14,525.58 on the ground that a bad debt deduction of $89,000.00 was allowable on the decedent's return for loans made by him to the American Society for Opera in English, Inc., which loans were ascertained by the decedent to be worthless and were charged off by him in the year 1929, and on the further ground that a deduction of $2,860.70 should be allowed on the return because of nontaxable distributions made by Cerro de Pasco Copper Corporation from its depletion reserves which had been included in the taxable income shown on the return. The refund claimed by reason of the bad debt deduction was $13,953.14, for the recovery of which this suit is brought, and the amount claimed by reason of the non-taxable corporate distribution was $572.44, which has been refunded and which is not involved in this case.

4. Thereafter, the Commissioner of Internal Revenue considered the claim for refund, allowed it in the sum of $572.44, and refunded that sum to the plaintiffs, and on Jan-

uary 23, 1933, disallowed it to the extent of the balance of $13,953.14, the amount involved herein.

5. The decedent, William T. Carrington, advanced sums of money amounting to $89,000.00 to a corporation known as the American Society for Opera in English, Inc., by his personal checks and by checks of the brokerage firm of Charles D. Barney & Co. which were charged against and paid by the decedent, which advances were made on the dates and in the amounts following:

September 6, 1927	$4,000.00
October 7, 1927	3,000.00
December 7, 1927	5,000.00
December 10, 1927	10,000.00
December 14, 1927	6,000.00
December 20, 1927	15,000.00
January 4, 1928	10,000.00
January 12, 1928	15,000.00
January 27, 1928	10,000.00
February 17, 1928	5,000.00
September 7, 1928	1,000.00
November 23, 1928	5,000.00
Total	89,000.00

No notes or other evidences of indebtedness were given by the corporation to the decedent for the above amounts, but these amounts were designated on the books of the corporation as loans from the decedent to it.

6. The American Society for Opera in English, Inc., was a business corporation incorporated under the laws of the State of New York on July 15, 1927, for the purpose of producing operas in the English language, and to sustain, encourage, and cultivate a taste for music, literature, and the arts. Its authorized capital stock was 7,500 shares, of which 6,000 shares of the par value of $25.00 each were preferred stock and 1,500 were common stock. No common stock was issued. The decedent, William T. Carrington, was president of the corporation.

7. The performances of operas in the English language which were produced by the American Society for Opera in English, Inc., were successful from a financial and artistic

standpoint in many of the cities in the United States where performances were given. Those who were interested in the corporation, and particularly the decedent, were anxious that its operations be made successful financially, and with that end in view experienced musical managers were employed to take charge of its management in order to put it on a sound financial basis. Miss Harriet Steele Pickernell, who had been in the business of managing concerts and musical productions for a long period of years, was engaged as business manager of the corporation in 1928. Miss Pickernell considered the operations of the corporation as business undertakings; to her its operations of producing operas in English gave promise of success, and that is what induced her to undertake its management. Some of the engagements which were filled by the opera company under Miss Pickernell's management, in cities outside of New York, resulted in a profit. However, on the whole, this corporation never was sustained by its own income.

8. The American Society for Opera in English, Inc., ceased to operate in the summer of 1929, at which time it was insolvent and without assets of any value.

9. The advances made by the decedent, as set out in Finding 5 herein, were treated as loans by both him and the American Society for Opera in English, Inc., and were in fact loans. These loans were in 1929 ascertained by the decedent to be worthless.

10. The decedent, William T. Carrington, kept no personal books of account. The preparation of the 1929 Federal income tax return of the decedent was supervised by William J. Woods, who was connected with the firm of Charles D. Barney & Co., through which the decedent transacted much of his business. In the latter part of November or the early part of December 1929, when Mr. Carrington was going over his Federal income tax matters for 1929 with Mr. Woods, he told Mr. Woods that the loans which he had made to the American Society for Opera in English, Inc., were a total loss to him and that he wanted them charged off on his 1929 income tax return. Mr. Woods replied that it might be difficult to establish the loss because

Mr. Carrington had not procured the notes which Mr. Woods had requested him to procure from the corporation. Mr. Carrington replied that he would get the notes for Mr. Woods. No notes were ever gotten by Mr. Carrington, and there is no evidence in the record of any attempt made by him to secure such notes.

11. Mr. Woods failed to claim the amount of the advances, $89,000.00, on the decedent's Federal income tax return for the year 1929, contrary to the decedent's instructions, because Mr. Woods was of the opinion that they could not be claimed as a deduction in the absence of notes. Mr. Woods, however, made a memorandum of the matter and put it in the working envelope in which the papers pertaining to the 1929 return were kept so that the deduction would be called to the attention of the revenue agent who should audit the return. After the filing of the 1929 return, Mr. Woods spoke to a revenue agent who was auditing Mr. Carrington's 1927 and 1928 returns about the deduction which Mr. Carrington had claimed for 1929, and the agent told Mr. Woods that if he, the agent, was assigned to examine the 1929 return he would be glad to take that matter up with Mr. Woods at that time. Within a week or two after Mr. Carrington's death, Mr. Woods, who was also one of the executors, took up with the attorneys for the estate the matter of the deduction to which Mr. Carrington claimed that he was entitled.

The court decided that the plaintiffs were entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiffs, as executors of the estate of William T. Carrington, deceased, have duly filed a claim for refund of taxes paid by the decedent for the year 1929 on the ground that in computing the taxes of the decedent for that year the Commissioner failed to allow $89,000 as a bad debt deduction by reason of which the decedent's taxes were overpaid in the sum of $13,953.14, for which sum judgment is asked.

Syllabus

The commissioner of this court found that in the years 1927 and 1928 the decedent made loans aggregating $89,000 to a corporation known as the American Society for Opera in English, Inc., and that in 1929 he ascertained the debts created thereby to be worthless. Counsel for defendant argue that the evidence does not sustain the commissioner's findings. It would serve no useful purpose to discuss the evidence as we agree with our commissioner and have affirmed his conclusions.

The defendant also contends that there is no evidence that the decedent charged off the loans on any books, and argues that as the decedent did not claim the deduction in his return it can not be allowed. The decedent kept no books of account and when his 1929 tax return was being made up he stated to his agent who was preparing the return that the loans were a total loss and that he wanted them charged off on the return. The failure to include the deduction in the return is thus fully explained. Under the circumstances, we think the plaintiffs were entitled to make a claim for refund. See *Peters* v. *United States*, 80 C. Cls. 830.

The plaintiffs are entitled to recover $13,953.14 together with interest thereon as provided by law. Judgment will be rendered accordingly.

Whaley, *Judge;* Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

DETROIT CLUB v. THE UNITED STATES

[No. 42947. Decided March 7, 1938]

On the Proofs

Internal revenue; taxes on club dues and initiation fees.—Where the social features of a club were quite attractive, and not merely incidental, but constituted an essential factor of the organization, it is held that the club is a "social club" within the meaning of the statute taxing dues and initiation fees of such clubs, even if its predominant purpose is the serving of luncheons to its members.

The Reporter's statement of the case:

Mr. Arthur L. Evely for the plaintiff. *Messrs. Raymond H. Berry* and *Ralph W. Barbier* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* was on the brief.

The court made special findings of fact as follows:

1. Detroit Club, plaintiff, is a corporation organized under the laws of the State of Michigan. It was organized in April 1883, and re-incorporated in April 1913. It is located in the city of Detroit. Its purposes, as set forth in its articles of association, are:

> THIRD. The purpose of this association is to promote social intercourse among its members and to provide for them the conveniences of a clubhouse * * *.

2. Plaintiff paid to the Collector of Internal Revenue, Detroit, a total of $75,049.68, as taxes on the dues and initiation fees of its members, for the period October 1929, to and including October 1933, at the dates specified in the petition pursuant to the provisions of Section 413 of the revenue act of 1928 (45 Stat. 864; 26 U. S. C. A. 950).

On November 29, 1933, plaintiff filed with said Collector its claim for refund in the amount of $74,456.30, on the ground that plaintiff was not a social club within the intent of the taxing act. On February 27, 1934, plaintiff amended its claim by increasing the amount to $75,049.68.

On November 7, 1933, plaintiff, at an annual meeting, adopted a resolution that members who paid this tax relinquished all right, title, or interest in, and assigned to the club any refund which might be secured in connection with such tax on dues. Also, powers of attorney to the club of various members who had been assessed their proportionate parts of said tax are of record.

3. On November 14, 1934, the Commissioner of Internal Revenue rejected plaintiff's amended claim for refund. He held that the dues and fees paid by members were properly subject to the tax imposed. His letter of rejection contained the following:

Reporter's Statement of the Case

> Careful consideration has been given to the evidence submitted. It is held in view of the purposes of the club, as set forth in its articles of association, the clubhouse and facilities maintained for the use of members and the social features, such as billiards, card playing, etc., that the social features form a material purpose of the club, and that it qualifies as a social club or organization within the meaning of section 501 of the revenue act of 1926, as amended by section 413 of the revenue act of 1928 * * *.

4. Plaintiff's by-laws provide that the club shall be managed and controlled by a board of directors, elected by its members; that said board of directors shall annually elect from its number a president, two vice presidents, a treasurer, a secretary, an auditor, a chairman and two members of the house committee; that its board of directors shall make such rules and regulations as it deems necessary for the management of the clubhouse and its property.

The club has the following seven committees: art committee, billiards committee, entertainment committee, games committee, historical committee, library committee, and plumasserie committee. Its card committee operates under its games committee.

5. The club has the following four classes of membership: resident, nonresident, associate, and lady members. During the period here involved, the club's total membership varied from about 1,150 to about 950, of which approximately three-fourths were resident members; the balance of said membership, in diminishing numerical strength, consisted of nonresident, lady members, and associate members. The club has a waiting list. Following the submission of a questionnaire, prospective members are placed in nomination by sponsors. The initiation fee of resident members, prior to 1933, was $750, and since 1933 it has been $400. The annual dues of resident members, prior to 1933 were $200, and since 1933 have been $150. The dues of nonresident members and women members are $50 per year. The privileges of using the women's department of the club are extended to the wives, unmarried sisters, and children of the members.

Reporter's Statement of the Case

6. Plaintiff's clubhouse is located at the corner of Fort and Cass Avenue in the City of Detroit. It occupies a lot 178′ x 176′, has four stories, and was built by the club in 1892. In 1935 the book value of its land was $121,037.44; the depreciated book value of its building was $201,364.85; and the book value of its furnishings was $84,251.91.

Plaintiff also occupies two floors of the "Free Press" building, which adjoins plaintiff's property. These two properties are connected by a bridge extending from the third and fourth floors of the club building. Plaintiff's lease covering said two floors of the "Free Press" building runs from 1925 to 1945, and its rental is on a graduated scale. The lease provides for a total rental of approximately $500,000 for said 20-year period, its present monthly rental being at the rate of $1,600. According to the provisions of the lease, plaintiff assumed the cost, in an amount of $74,209.18, for altering and decorating the leased premises.

7. The first floor of plaintiff's clubhouse embraces a large entrance hall, lounge and reading room, grill room and bar, clerk's office, wash room, reception room, and cigar counter. The entrance hall is 20′ x 30′, from which an attractive staircase leads to the other floors. Elevators serve all floors. The club has its own brand of cigars, and the cigar stand sells smoking articles, candies, and novelties. During holiday periods, the entire room is given over to the sale of tobacco, fruit, candies, and liquor, the sales from which, in 1929, totaled $41,467. Plaintiff subscribes to 50 papers and periodicals at an annual cost of $400, including weekly and monthly magazines, many daily newspapers, and financial sheets. The lounge extends the entire width of the building, is furnished with 50 chairs and davenports, tables for reading matter, and floor lamps. Its walls and ceilings are paneled. The reading and writing room adjoins the lounge and contains a reference library of 200 volumes, also tables and writing desks. Many valuable oil paintings decorate the walls of the lounge and reading rooms.

The grill room is equipped with 20 tables and 90 chairs, is finished in Flemish oak, and the walls are decorated with mounted animal heads and birds. It contains a bar and oyster service bar, and serves as an informal eating place.

Members gather in the grill room during the cocktail hour, which runs from 4:30 to 6:30 P. M. Free lunch of crackers and cheese is available at the bar. The card room attendant is on call to assist at the bar during the cocktail hour.

On the second floor the club has its card room with service bar, billiard room, directors' room, and manager's office. The billiard room is equipped with four billiard and two pool tables, numerous chairs, and is paneled. Plaintiff holds billiard tournaments during the winter, and exhibitions are occasionally given by professionals. An attendant is on duty every day and the tables are taxed to their capacity during the noon luncheon period. The card room is equipped with 30 tables, has a service bar, and an attendant is on duty during the busy period of the day. Bridge is the most popular game, although chess, mah jong, backgammon, and dominoes are also played. The walls carry bridge tournament trophies on which are inscribed the winners' names. There is a collection of books on bridge. The club uses its own special playing cards and score pads. Members are served luncheons while playing in both the billiard and card rooms. On this floor there is a barber shop which has three barber chairs, also two manicure tables.

On the third floor of the club building and annex are the ladies' dining room, ladies' dressing or powder room, six private dining rooms, men's dining room, and the kitchen. The two main dining rooms, both large and beautifully equipped, are on this floor. The ladies' dining room seats 120 and the men's dining room seats 100. The ladies' lounge and powder room are finely equipped. The private dining rooms will seat parties ranging from small to rather large groups.

The fourth floor contains a large library, two private dining rooms, 23 bedrooms, service room, rest room, linen room, and servants' locker room. The ladies' department is in the "Free Press" building, admission to which is by separate entrance and elevators. The library, of two connecting rooms, contains 5,000 volumes and consists largely of fiction. Each of the 23 bedrooms has a private bath and compares favorably with rooms in any first class hotel.

8. The club is kept open from 7 A. M. to 10 P. M. The average daily attendance at the club is 190. The largest number of members is attracted during the noon period.

During 1930 the club employed 116 attendants. A large number were employed in the kitchen and dining room; 31 served the clubhouse in various positions, such as bellboys and elevator attendants. Attendants were on duty at the bar, cigar counter, card room, billiard room, sleeping rooms, and barber shop.

The dining rooms and kitchen service rooms utilized about 55% of the clubhouse space. During 1931 there were served in the women's department 660 breakfasts, 16,309 luncheons, and 6,962 dinners. During the same year there were served in the men's department 4,228 breakfasts, 53,287 luncheons, and 6,745 dinners. The private dining rooms in the men's department are freely used by members, business groups, and by organizations which are given the facilities of the club through a member thereof. The ladies frequently use their dining room and private dining rooms for luncheons, family dinner parties, before-theater parties, formal entertaining, debutante and young people's parties. Lady members play bridge, and bridge lectures are given in the private dining rooms. Daily, small groups are entertained in the ladies' department, and two or three times a week functions are given with attendance of 25 or 30. Drinks are served to the women.

9. The average age of the club members is about 50 years. Through the issuance of guest cards, members may extend the privileges of the club, including lodging, to nonmembers. Members frequently sponsor breakfasts, luncheons, or dinners for the entertainment of prominent men visiting in Detroit. Radios are in the grill room and the barber shop. A piano is available for use on the third floor. Lectures, with motion pictures, are occasionally given. The club is the center of friendly gatherings, and its noonday luncheons furnish the average member a convenient opportunity for meeting his friends under pleasant conditions, reading the papers and magazines, and relaxing while playing cards or billiards.

The club provides a service for the securing of theater, baseball, railroad, and other tickets. During the football season it arranges for special cars with transportation, tickets to the game, and luncheon served en route to Ann Arbor, Michigan. It has a regular New Year's function with a collation and music, at which an address is made by a member selected for the occasion. At Thanksgiving time the club holds its annual Keno party which is arranged for by its Plumasserie Committee, and is largely attended. The Keno party is preceded by a dinner, and the members play for turkeys. In connection with the playing of bridge by its members throughout the winter, a professional instructor is employed through fees paid by the participants, and such meetings, following dinners, are held on Monday nights with instruction and play in the form of tournaments. Individual cups are awarded for each night's play, and the season's winners have their names inscribed on the annual trophies. During 1931 the club expended $780 for silver prize cups.

The various activities of the club are run at a loss. The club uniformly shows a loss both as to serving of meals and as to its games; the rooms rented usually show a profit; and the cigar counter shows a net profit. The sale of drinks shows a substantial net profit, particularly since prohibition. The club served intoxicants both before and subsequent to prohibition. It depends primarily for its support on the dues and initiation fees of its members. The superior quality of the meals served was one of the special attractions of the club.

10. The club promotes social intercourse among its members and provides for them the conveniences of a clubhouse, which are the purposes set forth in plaintiff's articles of association. The club provides a convenient and pleasant place for luncheons and relaxation. It furnishes comforts, attractions, and opportunities for various games. Its social activities, as herein enumerated, are attractive to both men and women. These factors are not merely incidental, but constitute essential features of its life. These features are both material and necessary to the life of the club.

CONCLUSION OF LAW

The court decided that the plaintiff was not entitled to recover.

PER CURIAM: The facts of the case are clearly set forth in the findings. Plaintiff is a club organization which has been required by the Commissioner to pay taxes upon dues which it received on the ground that it is a social club within the meaning of the law. This is denied by the plaintiff and, a claim for refund having been duly filed, it seeks to recover the dues so paid.

It may be that the predominant purpose of the club is the serving of luncheons to its members, but the commissioner of this court has found that the social features as set out in the findings were quite attractive and not merely incidental, but constituted an essential factor in its existence. In this finding we concur, and under repeated decisions of this court the plaintiff's petition must be dismissed. It is so ordered.

WORDEN & COMPANY, INC. v. THE UNITED STATES

[No. 42982. Decided March 7, 1938]

On the Proofs

Income tax; claim for refund.—Preponderance of evidence held to show that claim for refund, alleged to have been filed, was never filed.

The Reporter's statement of the case:

Mr. John J. Cunneen for the plaintiff. *Mr. William J. Dodge* was on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. During the calendar year 1929, the plaintiff was a New York corporation, with its principal place of business at 10 East 40th Street, New York, New York. It was organized as a corporation under and by virtue of the laws of the State of New York on October 24, 1921, and was dissolved in accordance with the laws of that state on December 20, 1929.

At the date of dissolution there were outstanding 400 shares of capital stock of which one share was then owned by Guy W. Renyx and the remaining shares were then owned by Flora R. Renyx, his wife. Plaintiff's directors on the date of dissolution were Flora R. Renyx, Guy W. Renyx, and Herbert S. Duncomb. The latter resigned as a director on January 11, 1930.

The Guren Company was likewise a New York corporation organized September 30, 1926, with its principal place of business during the year 1929 at 10 East 40th Street, New York, New York.

Both of these corporations were organized for the purpose of engaging in the business of organizing and financing commercial enterprises and to purchase and sell securities and real estate in connection with such activities.

The Guren Company was a wholly owned subsidiary of the plaintiff corporation during the year 1929.

2. On March 15, 1930, the plaintiff filed a tentative consolidated corporation income tax return for the calendar year 1929 for itself and for its subsidiary, The Guren Company. That return contained no figures whatsoever and merely reported "no tax." In a letter addressed to the Collector of Internal Revenue for the Third New York District, plaintiff asked for an extension of time within which to file a completed return for itself and for its subsidiary. In a letter dated April 11, 1930, the Collector of that District granted an extension to May 15, 1930.

On May 15, 1930, plaintiff filed a completed consolidated income tax return for itself and for its subsidiary for the calendar year 1929, reporting thereon a total net income of

$155,315.22 and a total tax thereon of $17,084.67. In a schedule attached to that return, the net income so reported was computed as follows:

Consolidated taxable net income, calendar year 1929	Worden & Co.	The Guren Company	Total
Income:			
Commissions	$250,000.00	----------	$250,000.00
Interest	8,660.46	$624.41	9,284.87
Rents	----------	6,000.00	6,000.00
Loss-sales of securities	----------	*90,050.15	*90,050.15
Dividends	----------	4,955.00	4,955.00
	258,660.46	*78,470.74	180,189.72
Deductions:			
Compensation of officers	7,500.00	----------	7,500.00
Taxes (real estate)	----------	4,425.00	4,425.00
Dividends	----------	4,955.00	4,955.00
Depreciation	----------	4,390.00	4,390.00
Maintenance expenses	----------	325.00	325.00
Clerical assistance, etc	1,200.00	----------	1,200.00
Traveling expense	995.50	----------	995.50
Transfer stamps	----------	1,084.00	1,084.00
	9,695.50	15,179.00	24,874.50
Net income	248,964.96	*93,649.74	155,315.22

*Loss.

The tax so reported in the sum of $17,084.67, together with accrued interest of $42.61, was assessed by the Commissioner of Internal Revenue on the May 1930 list, Account No. 320006, signed August 14, 1930. This tax was paid in installments as follows:

May 16, 1930	$4,313.88
June 18, 1930	4,271.17
September 15, 1930	4,271.17
January 12, 1931	4,271.17
Total	17,127.39

3. The Commissioner of Internal Revenue on the May 1930 list assessed additional interest against plaintiff of $35.73 for the year 1929. On this item of interest, the plaintiff by Guy W. Renyx on December 7, 1931, filed an offer in compromise in the sum of $18, giving as grounds for acceptance the following:

> Worden & Co., Inc., are virtually out of business and I have no funds. They have not paid the State Tax, but I, as one of the Officers of the Defunct Corp., am submitting this offer so as to close this matter.

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In the printed portion of the blank form appears the following:

> In making this offer, and as a part of the consideration thereof, the taxpayer hereby expressly agrees that all payments and other credits heretofore made to the account(s) for the year(s) under consideration, for which an unpaid liability exists, shall be retained by the United States, * * *.

This offer in compromise was approved by the Secretary of the Treasury on February 3, 1932.

4. During March 1931 a revenue agent made an examination and an audit of the books and records of the plaintiff and its subsidiary for the taxable year 1929. He prepared a report, dated March 12, 1931, a copy of which was furnished to the plaintiff on April 13, 1931, recommending, among other adjustments, an elimination from the income reported upon plaintiff's 1929 return of the first item shown in the computation in finding 2 hereof as "commissions, $250,000.00" upon the ground that these commissions and income properly constituted the personal income of Guy W. Renyx, who, during the taxable year 1929, was an officer and director of the plaintiff corporation. On May 13, 1931, plaintiff filed a sworn protest against the adjustment proposed by the revenue agent.

The Commissioner of Internal Revenue subsequently considered the revenue agent's recommendation and plaintiff's protest and determined that the item of $250,000.00 reported as income by the plaintiff constituted income properly taxable to Guy W. Renyx, individually.

5. On December 1, 1931, the Commissioner of Internal Revenue mailed a registered deficiency letter to Guy W. Renyx, proposing to assess an additional tax against him of $58,468.74, the greater portion of which was attributable to the inclusion of the $250,000.00 item of commission in his individual income.

6. In accord with the statutes made and provided in such cases, Guy W. Renyx filed a petition for redetermination of the proposed deficiency with the United States Board of Tax Appeals, Docket No. 61559. In the petition Guy W.

Renyx contended that the plaintiff was liable for the amount of income tax payable upon the item of $250,000 commission which it had already reported in its corporate income tax return and paid the proper income tax thereon.

In due course the proceeding before the Board of Tax Appeals was called for hearing, the petitioner therein, Guy W. Renyx, appearing *pro se*. Subsequently, the Board affirmed the deficiency proposed by the Commissioner of Internal Revenue (which was based upon a taxable net income that included the item "Commissions $250,000," as aforesaid) and entered an order accordingly.

7. The deficiency for 1929 against Guy W. Renyx determined in the proceeding before the Board of Tax Appeals, as aforesaid, together with interest of $10,726.21 was assessed in April 1933, and subsequently abated in full for the reason that it was found to be uncollectible. Demand was made upón Guy W. Renyx for payment of the amount so assessed, but he never paid it.

8. On January 15, 1932, the Commissioner of Internal Revenue sent to the plaintiff the following letter:

> Your income tax assessed for the year 1929 appears to be $17,084.67 in excess of the amount due, for the following reasons:
>
> Commissions received on sale of stock of Colonial Finance Trust reported as income by the corporation held to be income of Mr. Guy Renyx.
>
> The limitation imposed by law is about to expire as to one or more of the years involved, after which a refund or credit can not be made of any amount ultimately found to have been overpaid unless a claim is filed before the expiration of such limitation. It is therefore suggested that you prepare a claim upon the enclosed Form 843, specifically setting forth in such claim the grounds or basis of the apparent overpayment as above indicated. The claim should be properly signed by a duly authorized person and sworn to before a notary public (or other officer authorized to administer oaths for general purposes) and should be filed immediately with the Collector of Internal Revenue for the district in which the tax was assessed or paid. The accompanying copy of this letter should be attached to the claim when filed.

Two forms 843 were enclosed with the letter.

On February 11, 1932, Guy W. Renyx on behalf of the plaintiff, filled out exactly alike the two forms 843, claim for refund, enclosed with the letter referred to above, and each was signed and sworn to by him before a Notary Public, and in support of the claim gave the following reasons:

> This claim is filed pursuant to Letter IT: AR: A-5-RCH form 1405M, dated January 15, 1932. It is claimed by the Treasury Department in a deficiency notice addressed to GWR, dated Dec. 1, 1931, that the Commission earned is earned by GWR. The deficiency is contested by undersigned.

9. What purports to be a copy of the claim for refund prepared by plaintiff was introduced in evidence. The basis of this claim was the assessment referred to in the Commissioner's letter of January 15, 1932, and Guy W. Renyx testified that he mailed the original addressed to the Internal Revenue Department, Customs House, New York City [in which was the office of the Collector of the Second District of New York] on February 11, 1932. But the preponderance of the evidence shows that neither the claim nor the letter which Renyx testified he sent with it was ever received by the Collector of the Third District of New York, or by the Collector of the Second District of New York, or at the office of the Bureau of Internal Revenue at Washington, D. C., or filed in any of these offices.

10. No part of the sum of $17,127.39 collected from the plaintiff as federal income tax and interest thereon for the year 1929 has been repaid.

The court decided that the plaintiff was not entitled to recover.

PER CURIAM: This suit is brought to recover $17,127.39 with interest claimed to have been illegally collected by the defendant as a corporation income tax for the year 1929.

One of the defenses set up in the case is that no claim for refund was every filed as provided by law. Guy W. Renyx, one of the directors of the company, testified that

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he prepared and mailed a claim for refund to the Collector of the Second District of New York on February 11, 1932, but his testimony was given more than three and a half years after that date and it is not uncommon in future years for a person to imagine that he performed an act which he intended to do. The claim should have been sent to the Bureau of Internal Revenue at Washington, D. C., or at least to the Collector of Internal Revenue of the Third District of New York where plaintiff had filed its income tax return and paid its tax. There is no record in the office of the collector of either the second or third districts. or in the Bureau of Internal Revenue at Washington, D. C., of any claim ever having been filed. Among the files of the many thousands of cases presented to the Bureau of Internal Revenue incidental papers are sometimes lost but the evidence shows that when a claim for refund was received at the offices of the collectors mentioned above, a number of notations were made, certain proceedings were had, and the claim was transmitted to the office of the Commissioner of Internal Revenue where it was filed and a further record made. Under these circumstances the commissioner of this court in effect found that no claim was ever filed, and we think it evident that the preponderance of the evidence shows that his conclusion was correct.

Having determined that no claim for refund was ever filed, it becomes unnecessary to consider the other defenses set up by the defendant. The petition must be dismissed and it is so ordered.

GENERAL CONTRACTING CORP. v. THE UNITED STATES

[No. 43138. Decided March 7, 1938]

On the Proofs

Government contract for deepening navigable channel; changes made due to unusual conditions.—Where, on showing made by contractor, it was found that unusual conditions not set forth in the contract, did exist and on that account the Government consented to changes in the price to be paid per cubic yard for excavation, it is held that the change in price per cubic

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yard was intended to apply to all the work performed under the contract, and the contractor was entitled to the increased rate of pay from the beginning of the work.

Same; acceptance of preliminary partial payment not an estoppel.—Where on account of heavy preparatory expenses contractor requested, received and accepted a preliminary payment at the original unit rate in the contract, it is held that contractor is not thereby estopped from claiming the additional amount by implied acquiescense. *Joice* v. *U. S.*, 51 C. Cls. 439 and *Southern Pacific* v. *U. S.*, 268 U. S. 263 distinguished.

The Reporter's statement of the case:

Mr. Wm. D. Harris for the plaintiff. *Palmer, Stellwagen, Scott & Neale* were on the brief.

Mr. Henry Fisher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. P. M. Cox* was on the brief.

In this case plaintiff had a contract with the United States for deepening the navigable channel below Lock 41 at Louisville, Kentucky. Under the contract no work was to be performed during the winter months. Because of unusual conditions encountered, the only work performed by plaintiff before operations were suspended for the winter consisted of explorations at various points for the purpose of discovering the exact nature and condition of the bed of the channel, and considerable money, amounting to more than $30,000, was expended by plaintiff in beginning operations and carrying on this preliminary work. In December 1933 the contracting officer made a preliminary estimate and paid plaintiff the amount of $6,391 less retained percentages of $639.10 based upon an estimate of 1,100 cubic yards rock excavation. This payment was computed at the unit price for rock excavation stated in the contract prior to the change hereinafter mentioned in the findings. At and before this preliminary estimate and payment were requested by plaintiff and paid by the contracting officer, plaintiff had insisted and was still insisting that the conditions and materials encountered were materially different from those contemplated by the contract and that the unit price for rock excavation should be increased. No final ac-

tion had been taken upon its protest and request for an increase in the unit price for rock excavation. The contract was subsequently ordered changed by the chief of engineers upon the grounds claimed by plaintiff before work was begun in the spring of 1934 and the unit price per cubic yard for rock excavation was thereafter accordingly increased. The modification of the contract was negotiated and agreed upon between plaintiff and the contracting officer and soon thereafter the contracting officer prepared and signed a revised estimate, #1, allowing plaintiff an additional amount for the difference between the preliminary payment for 1,100 cubic yards at the rate originally stated in the contract and the higher rate per cubic yard stated in the contract as changed—such difference amounted to $3,234. The contracting officer recommended payment, which was refused and disallowed by the Comptroller General. This suit is for the recovery of that amount and the question presented is whether the unit price for rock excavation as agreed to between the parties on June 11, 1934, was intended to apply and did apply to all work under the contract, and payments therefor, including the preliminary estimate of excavation in connection with which a preliminary payment had been made in December 1933.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Delaware corporation, with principal place of business at Pittsburgh, Pennsylvania.

2. On September 20, 1933, W. A. Johnson, lieutenant colonel, corps of engineers, War Department, forwarded to plaintiff a copy of the specifications, and other data, covering proposed work in connection with deepening the navigable channel below Lock No. 41 at Louisville, Kentucky, and invited it to submit bids for such work. In this invitation, prospective bidders were advised as follows:

> *Investigation of conditions.*—It is expected that bidders will visit the site and acquaint themselves with all available information concerning the nature of the work and make their own estimates of the facilities needed, the difficulties attending the execution of the

proposed contract, including local conditions, uncertainty of weather and other contingencies. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for improperly estimating the difficulties and costs of performing the complete work as required.

The invitation for bids was accompanied by proposed specifications. Among the pertinent provisions of the proposed specifications were the following:

> 2. *Work to be done.*—* * * The work to be done consists of the removal and disposal of the ledge rock and overlying material in the river bed at the lower approach to the locks at Dam No. 41, Ohio River, within the limits indicated on the drawing. * * *
>
> 5. *Payments.*—Payments will be made monthly on estimates of such material as has been excavated and deposited in accordance with the specifications and not included in any prior estimate, except that ten per cent of the amount of each estimate will be retained until the full completion and acceptance of all work covered by the contract, when final payment will be made: *Provided, however,* That where, in the opinion of the contracting officer, the attendant circumstances in any particular case are such as to warrant such action, semimonthly partial payments may be made subject to the same retained percentage provided for herein above.
>
> 9. *Condition of channel.*—The ledge rock to be removed is directly below Auxiliary Lock No. 41. The rock has been previously removed between the area of the proposed excavation and the lower guide wall of the main lock. * * *
>
> 13. *Character of materials.*—The material to be removed is believed to be mud, and medium hard limestone and shale in strata of varying thicknesses, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly. In the event that materials, structures, or obstacles of a materially different character are encountered during the progress of the work, and for that reason the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of, or less than the unit price bid by the contractor the contracting officer, in either alternative, will then proceed in accordance with the provisions of article 4 of U. S.

Government Form No. P. W. A. 51, or any authorized revision thereof.

14. *Work covered by price bid.*—(a) The price bid per cubic yard for rock excavation shall cover the cost of drilling, blasting, removal, and disposition of all ledge rock encountered.

(b) The price bid per cubic yard for common excavation shall cover the cost of dredging and disposal of any mud deposit or any other loose material which overlies the rock to be removed.

15. (c) *Place measurement.*—The material removed will be measured by the cubic yard in place by means of soundings taken before and after dredgings. The drawing already prepared (par. 6) is believed to represent accurately the average existing conditions; but the depths shown thereon will be verified and corrected, if necessary, by soundings taken shortly before dredging under these specifications is begun at any locality. * * *

17. (b) Final estimates will be based entirely on the difference between the last soundings made before dredging and the results of the last examination, except that scow measurements may be used at the discretion of the contracting officer for the final estimate of the amount of overlying material removed. All estimates will be subject to proper deductions or corrections of deductions for excessive over-depth dredging or side slope dredging (par. 11). Final acceptance of the whole or a part of the work and the deductions or corrections of deductions made thereon will not be reopened, after having once been made, except on evidence of collusion, fraud, or obvious error, and the acceptance of a completed section shall not change the time of payment of the retained percentages of the whole or any part of the work stated in paragraph 5.

19. (b) In order that the contractor may receive payment as provided by paragraph 5, the full depth required under the contract must be secured in the whole of the area worked over as the work progresses, nor will payment be made for excavation in any area not adjacent to and in prolongation of areas where full depth has been secured except by special decision of the contracting officer. Should any such nonadjacent area be excavated to full depth during the operations carried on under the contract, payment for all work therein may be deferred until the required depth has been made in the area intervening.

25. *Plant.*—(a) The contractor agrees to place on the job sufficient plant of size suitable to meet the requirements of the work. Plant shall be kept at all times in condition for efficient work, and subject to the inspection of the contracting officer. It is understood that award of this contract shall not be construed as a guaranty by the United States that plant listed in statement of contractor for use on this contract is adequate for the performance of the work.

28. *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See arts. 3 and 15 of contract.)

3. October 6, 1933, plaintiff submitted its bid of $5.81 per cubic yard for rock excavation, and $5.56 per cubic yard for common excavation. This bid was submitted without plaintiff having made a preliminary investigation of the site to determine the character and amount of ledge rock, mud deposit, and other loose material overlying the rock. Plaintiff was prevented from making such preliminary investigation by the current, which was so strong that an especially adapted plant was required to hold in the current. The bid was accepted, and, on October 13, 1933, plaintiff entered into a contract with defendant. Copies of this contract and the accompanying specifications are of record as plaintiff's exhibit 1, which are by reference hereby made a part hereof.

4. Early in November 1933, and prior to the time required by the contract, plaintiff brought to the site its floating equipment for rock drilling, blasting, and dredging. Shortly thereafter plaintiff discovered that the loose material overlying the ledge or solid rock consisted not only of mud, but of sand, gravel, logs, and bowlders of varying sizes that had formerly been blasted, but had not been removed by another contractor. This overburden of loose material covering the ledge rock varied in thickness from 8 inches to

3¼ feet. The drills brought on the job by plaintiff proved inadequate for the conditions encountered; the drills were jammed and caught between the seams of the loose rock. Thereupon, plaintiff consulted expert manufacturers of rock-drilling equipment, who advised a change to other forms of drills adapted to the character of the work being encountered. From early in November until early in December 1933, plaintiff was engaged in exploring the area covered by the specifications and in making tests to determine the character and nature of the materials that were to be handled. The specifications represented that there would be 16,500 cubic yards of ledge rock excavation which would require drilling, shooting, and removal, and that over the entire area there would be 100 cubic yards of common excavation above the elevation required in the contract.

5. On November 28, 1933, plaintiff reported to the contracting officer that, because of certain materials encountered, the equipment then on the job was not adequate for the required drilling; that plaintiff was then making a further survey to determine the reason for such failure; that plaintiff had employed another expert to suggest the proper kind of drill; that it had discovered a great deal of overburden material which included logs, timber, bowlders, and loose rock which was lodged in and on the ledge rock; that this had not been shown by the specifications or drawings, and was in excess of what could reasonably be expected.

December 4, 1933, plaintiff, by letter, reported that a check indicated a considerable difference between the amounts of such overlying materials as set forth in the specifications and the quantity actually found by the contractor and its engineers; that a much greater amount of overlying materials appears to be present than had been anticipated; it suggested that, inasmuch as conditions were so different from those represented in the specifications and drawings, the contracting officer should exercise his authority under article 4 of the contract; and requested that an adjustment be made in accordance therewith.

December 8, 1933, the contracting officer replied as follows:

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> This is to acknowledge receipt of your letters of November 28th and December 4th. I have given most careful consideration to the matter discussed in the later letter and do not see any material difference that would justify the issuance of a change order or of an extension of the time of completion.
>
> The work specified is rather difficult and is of a kind not usual in this part of the country. It is reasonable to expect that the work will go slow at first until your organization develops the proper methods to use. If you place proper equipment on the work I have no doubt that the work can be completed within the specified time.

December 19, 1933, plaintiff notified the defendant, through its district engineer, that due to approaching cold weather, it would be inadvisable for the plaintiff to continue its work after that date, and gave written notice of same in accordance with the provisions of the contract.

6. By December 19, 1933, plaintiff had established a plant on the site sufficient to perform the work in accordance with the terms of the contract, had the materials been as represented by the Government. By that time plaintiff had expended approximately $20,682 for materials, towing, drill-boat charges, and insurance; and approximately $9,353 for labor, making a total of $30,035. Plaintiff requested payment of a preliminary estimate, on the basis of material removed over a scattered area, and for the preparatory work done. December 21, 1933, the contracting officer replied that he would pay an estimate covering 1,100 cubic yards of rock excavation under the contract. The contracting officer further stated:

> The areas from which this rock was taken, while contiguous to the excavated channel, are not continuous and this material would not have been paid for under ordinary circumstances. However, I am aware that you have expended a considerable sum in preliminary work, in assembling plant, and in experimentation and that the work is somewhat unusual and difficult. I have made the payment by a special decision in accordance with article 16 of the contract and paragraph 19b of the specifications. This is all that I can pay you at this time.

Defendant paid plaintiff the sum of $6,391, less retained percentages of $639.10, which sum was subsequently paid.

December 20, 1933, plaintiff again protested to the contracting officer claiming that the 100 cubic yards of material, as classified in the original specifications and drawings, turned out to be bowlders, loose rock, sand, and gravel of an undeterminable amount; that it was informed that the Government engineers had computed the amount to be in the neighborhood of 1,538 cubic yards; and plaintiff again requested the contracting officer to proceed under article 4, and increase the cost of the rock excavation, due to the difficulty of penetrating this overburden of rock and gravel.

7. January 16, 1934, plaintiff addressed a letter to the Secretary of War, in which it outlined the changed conditions and asked that a change be made in the contract price. April 3, 1934, the Chief of Engineers, by way of his "second endorsement" (which was communicated to plaintiff on April 13, 1934), ruled as follows:

> 1. From the information submitted, it appears that the conditions found materially differing from those set forth in the specifications are principally confined to quantities involved and the location thereof. It further appears that the troubles the contractor is experiencing are due principally to inadequate plant and/or insufficient experience on this class of work.
>
> 2. No facts can be found in this case upon which to base a change order increasing the unit prices to be paid the contractor or extending the time for completion.
>
> 3. The action taken by the District Engineer and recommendation of the Division Engineer are approved. The contractor should be so advised and instructed to complete the contract under existing terms.

February 2, 1934, the district engineer wrote plaintiff a letter, which included the following language:

> Since conditions are different from those described in the specifications and on which we canvassed your bid, it is likely that the Comptroller would consent to a supplemental agreement to terminate the contract. On what terms would you consent to surrender your contract to us so that we could complete the work with Government plant and hired labor, or otherwise as we might find most advantageous?

April 10, 1934, the contracting officer notified plaintiff that its appeal had been forwarded to the Secretary of War; that the Chief of Engineers had declined the appeal, and that the contracting officer would expect the completion of the contract in accordance with its terms.

8. During early May 1934, plaintiff resumed the work of drilling, blasting, and dredging. Shortly thereafter the president of plaintiff company went to Washington and had a conference with Major Bragdon in the office of the Chief of Engineers of the Army. It was disclosed in this conference that the ledge rock had been "shot over" by explosives in the year 1902, which had created an overburden of loose rock and other materials overlying the ledge rock. The president of plaintiff corporation was notified at this conference that a change order would be authorized, and that the district engineer would be informed that the contract prices for rock and common excavation should be modified on an equitable basis for the entire contract. It was further understood that the equitable price for rock excavation and common excavation would be a matter of agreement between plaintiff and the contracting officer.

May 12, 1934, the contracting officer notified plaintiff that he had received a letter from the Chief of Engineers, in which he stated that the conditions encountered by the contractor were materially different from those disclosed in the contract and specifications, and that the contractor was entitled to an equitable adjustment of the entire contract unit prices.

9. May 28, 1934, plaintiff, at the request of the contracting officer, submitted data covering its expenditures incurred in the drilling and excavating of rock, and its preliminary exploration. The contracting officer invited the president of the plaintiff corporation to a conference which was held on May 28 and 29, 1934, at Louisville, Kentucky. The contracting officer and president of plaintiff corporation arrived at an agreement to the effect that, on the basis of estimated quantities from the beginning of the work, the price of rock excavation, including drilling and shooting, should be $8.75 per cubic yard, and the price for com-

mon excavation should be $1.50 per cubic yard. May 29, 1934, change order No. 1 was drafted by the contracting officer in collaboration with the president of plaintiff corporation. June 11, 1934, said change order was approved, signed, and accepted by plaintiff. This change order reads as follows:

Reference is made to Articles 3 and 4 of your contract No. W559–eng–3176, dated October 13, 1933, for dredging ledge rock and overlying material from the lower approach to Locks No. 41, Ohio River, work under which is now in progress.

It has been determined that in view of your having encountered during the progress of the work subsurface and latent conditions materially differing from those shown on the drawings or indicated in the specifications, consisting (1) of ledge rock in 57 per cent of the area overlaid with sand and broken rock to a depth of 6 to 12 inches, which in the opinion of the contracting officer cannot be removed at the contract price for rock excavation, and (2) of sand, mud, gravel, and loose rock, in 43 per cent of the area which in the opinion of the contracting officer can be removed for less than the contract price for common excavation, it is necessary and in the best interest of the United States to modify said contract in certain particulars as follows:

"In consideration of the changes herein referred to, payments are to be made semi-monthly on the following basis:

"Common Excavation	$1.50 per cu. yd.
"Rock Excavation	8.75 per cu. yd.

"For rock drilled and shot to the satisfaction of the contracting officer during the estimate period, partial payment of the rock excavation price will be made at the rate of $3.00 per cu. yd., based on the estimated yardage over the area drilled and shot down to elevation 371.

"For rock excavation dredged and disposed of during the estimate period as provided for in paragraph 16 of the specifications, the balance of the bid price, $5.75 per cu. yd. for material dredged to elevation 371, and $8.75 per cu. yd. for all material removed between elevations 371 and 370 will be paid. Material lying on ledge rock which it is impractical to remove before blasting shall be paid for as rock."

It is understood and agreed that on account of the foregoing modification of said contract thirty-six (36) fair working days additional will be allowed for completion of the work.

It is understood and agreed that all other terms and conditions of said contract shall be and remain the same. * * *

10. At the time plaintiff executed the change order it forwarded to the contracting officer its revised estimate No. 1. In its revised estimate plaintiff made claim for the difference between 1,100 cubic yards of rock excavation at the original contract price of $5.81, paid under the original estimate No. 1, or $6,391 (including retained percentages), and 1,100 cubic yards of rock excavation at $8.75 per cubic yard, the price fixed in change order No. 1, or $9,625 (including retained percentages). The difference of $3,234 was the amount claimed by plaintiff in the revised estimate No. 1.

The contracting officer in his letter of June 4, 1934, to the president of plaintiff corporation, explaining a modification in the original agreed draft of the change order, stated:

> The quantities of rock and common excavation used in the computations of unit prices in the change order were estimates and were clearly recognized as such. Actual quantities as determined by the inspectors will be used for computing payments. I think this was clearly understood when the change order was negotiated. The classification will be made perfectly fair and whatever the amounts of the two materials that are found payments will be made at the unit prices agreed upon.

11. July 13, 1934, the contracting officer advised plaintiff that the matter had been referred to the Comptroller General for his opinion.

September 1, 1934, the acting district engineer in a letter to plaintiff stated:

> A voucher for the sum of $2,910.60, balance unpaid on Estimate No. 1, was forwarded by letter dated June 29, 1934, through regular channels to the General Accounting Office for approval. This action was taken because of the question of the date of application of the revised prices specified in Change Order No. 1. This office has not yet been informed as to whether a decision has been rendered by the Accounting Officer.

On November 27, 1934, and again on April 4, 1935, the Comptroller General refused to authorize payment of the amount of $3,234 as claimed by plaintiff, which had been approved and recommended by the contracting officer in revised voucher No. 1. The Comptroller General held that notwithstanding the fact that plaintiff insisted at the outset of the work, and continuously thereafter, that the estimate for rock excavation was erroneous because the conditions encountered were materially different from those contemplated by the contract, and that such excavation was more costly by reason of the changed conditions encountered than could have been anticipated, it was estopped to claim pay at the rate fixed by the contract as changed for the estimated excavation previously paid for at the unit price originally specified in the contract. He further held that inasmuch as the original payment had been accepted without protest noted on the voucher for such payment at the contract rate in force at the time, such acceptance closed the matter. For these reasons the Comptroller General held that the preliminary payment made December 20, 1933, was just compensation for the excavation on the basis of which that payment was computed at the time and that no further additional amount was allowable under the contract.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon the facts in this case three questions arise: (1) Whether upon a proper construction of a contract as changed on June 11, 1934, in view of the facts and surrounding circumstances, the unit price agreed upon between plaintiff and the contracting officer in the change order, pursuant to the understanding with plaintiff and the direction of the Chief of Engineers, applied to all rock and common excavation removed under the entire contract from the beginning to the end of the work. (2) Whether plaintiff is estopped from claiming the additional amount by implied acquiescence. And (3) In the event the language of the changed

portion of the contract is not susceptible of the construction that the new and revised unit prices were to apply to all excavation under the contract, was there a mutual mistake of fact in reducing the agreement of the parties to writing.

Defendant contends that plaintiff is precluded by his voluntary acceptance of the payment in December 1933 on a preliminary estimate of work performed to that date, and that the contract, as changed on June 11, 1934, is clear, definite, concise, and free from ambiguities and relates wholly and specifically to future payments to be made thereunder for excavations thereafter to be made.

Upon the facts and circumstances clearly disclosed by the record, we are of opinion that plaintiff is entitled to recover. At this point it should be stated that the defendant did not call as a witness in the case the contracting officer, who, by direction of the chief of engineers, negotiated and agreed with plaintiff with reference to the change in the contract. The contracting officer and plaintiff arrived at an agreement with reference to the revised unit prices and with reference to the effect of their application to the work called for by the contract. The evidence shows without contradiction that the parties reached an agreement that on the basis of estimated quantities (actual quantities excavated to govern in final payment) from the beginning of the work, the price for rock excavation, including drilling and shooting, should be $8.75 a cubic yard and for common exacavation it should be $1.50 a cubic yard. As we read the change order of June 11, 1934, which was drafted on May 29, 1934, by the contracting officer in collaboration with the president of plaintiff organization pursuant to the agreement they reached, it is not inconsistent with the established fact that the revised prices were to apply to both rock and common excavation from the beginning of the work. The reduced price for common excavation was applied to all common excavation by plaintiff, both before and after the date of the change. The fact that the language of the change order did not specifically refer to the prior preliminary estimate and payment is not conclusive. Neither is the statement in the change order that "in consideration of the changes herein referred to, payments are to be made semi-monthly on the

following basis." Of course, payments for work performed and not fully paid for were to be made in the future. Plaintiff resumed dredging early in May 1934, and all work done between that date and June 11, the date of the change, was paid for at the revised and changed unit prices agreed upon. At the very beginning the change order recited as follows: "It has been determined that in view of your having encountered during the progress of the work sub-surface and latent conditions shown on the drawing or indicated in the specifications * * *" materially different from those contemplated originally, etc. This language indicates, if it indicates anything, that the revised prices were intended to apply to all the work performed by plaintiff under the contract because it had encountered the conditions mentioned. In any event the precise meaning of the change order is sufficiently indefinite to authorize proof of the intent and understanding of the parties who entered into it and as to what was the actual agreement. In addition to the fact established by plaintiff that the unit prices specified in the change order were intended by both parties to apply to all work performed under the contract, there are other facts and circumstances disclosed by the record which show that this was the view of the contracting officer. The earlier payment on December 21, 1933, because of which this controversy arises, was a preliminary payment based upon an arbitrary estimate of 1,100 cubic yards of rock excavation which would not have been made under ordinary circumstances, but which was made, as stated by the contracting officer, because of considerable money expended in preliminary work in assembling the plant and in experimentation. All the work that plaintiff had done was in the nature of explorations to determine the actual condition of the bed of the channel because of conditions encountered when it first began work. During the same time the Government was engaged in making investigations and explorations for the same purpose. By reason of the exploration work performed by plaintiff over the entire area to determine the actual conditions as to the character of the work called for by the contract, plaintiff had by December 19, 1933, ex-

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pended over $30,000 in preparation for the performance of work called for by the contract and requested that a preliminary estimate be paid because of these expenditures. That was the basis on which, and the reason for, the payment which the contracting officer made December 21, 1933. At that time plaintiff had protested that conditions were materially different and had requested an increase in the unit price for rock excavation. The excavation done up to the time of this payment had been purely for the purpose of experimentation of the actual conditions over the entire area to be dredged, and, notwithstanding the preliminary or subsequent estimates, final payments were, according to the terms of the contract, to be based upon actual quantities of both common and rock excavation under the entire contract, and it was so recognized at the time this preliminary payment was made.

In addition, it appears that shortly after the change order was drafted and signed by plaintiff the contracting officer prepared a revised voucher no. 1 for an additional payment at the new rate for rock excavation for the preliminary estimate of 1,100 cubic yards of rock excavation on the basis of which plaintiff had theretofore been paid at the old unit price of $5.81 per cubic yard. The additional amount shown in this revised voucher no. 1 was not immediately paid and in the final estimate for all work performed under the contract, the contracting officer computed all the work, drilling, shooting, and excavating, under the contract from the beginning of the contract, October 16, 1933, until its conclusion November 3, 1934, at the revised contract price of $8.75 for rock excavation. He also computed all the common excavation from the beginning of the work at the revised contract price of $1.50 a cubic yard. The total amount shown and certified to by plaintiff and the contracting officer as earned in the final estimate included the sum of $3,234 involved in this suit. The Comptroller General disallowed and refused to approve for payment the last-mentioned amount of $3,234.

From the foregoing it seems clear that at all times the plaintiff and the contracting officer regarded the revised

prices, both as to rock and as to common excavation, as applying to the entire contract from its beginning to its end. We think the language of the change order is susceptible, on its face, to that interpretation.

If the changed portion of the contract is not susceptible of the interpretation that it was to apply to all the work done under the contract, there was, in view of the facts disclosed by the record, a mutual mistake of fact and the contract should be reformed to express the true agreement of the parties, namely, that the unit prices set forth in the change order applied to the entire contract.

It is clear that the plaintiff is not estopped by reason of the acceptance of the preliminary payment made under the original estimate no. 1 in December 1933. The case of *Joice* v. *United States*, 51 C. Cls. 439, upon which counsel for defendant relies, is clearly not in point. In that case the facts disclosed that upon several of the vouchers which plaintiff signed, and certified that the amount was correct and unpaid, were items showing the very pieces of lumber which that case concerned. Joice made no protest of any kind, did not object to any payments being otherwise than they purported to be, and received and collected all the intermediate payments, and, also, the final payment in full of the amount stated for the work called for. The claim involved in that case was not presented to the Department until more than six months after the final payment had been made and received without protest and the whole matter had been closed. In the case at bar plaintiff, prior to the first preliminary estimate and payment, had protested to the contracting officer who made the payment that the conditions encountered were materially different from those contemplated by the contract and specifications, and that the prices specified in the contract were inadequate for the work being performed. Such protest and request for an increase in the contract price was never withdrawn but was pursued and prosecuted by plaintiff diligently and was finally allowed and the contract was changed accordingly. The contract price was increased on the very ground requested by plaintiff. Neither is the case of *Southern Pacific*

Co. v. *United States*, 268 U. S. 263 in point. In that case the court said "But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown." Plaintiff requested the first payment merely as a preliminary payment, namely, on account of the large expenditures theretofore made. The preliminary estimate and payment were made by the contracting officer for the same reasons. The subsequent acts of both parties show that plaintiff not only continued to seek higher prices for all the work called for by the contract, but was successful in obtaining them. Plaintiff is entitled to recover $3,234, and judgment will be entered accordingly. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JULIUS HARTMANN, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ANNIE C. GRUN, DECEASED, v. THE UNITED STATES

[No. 43198. Decided March 7, 1938]

On motion to reconsider motion to dismiss; motion to vacate previous order and dismiss petition

Right of alien executor to sue in Court of Claims.—Under the statutes creating the Court of Claims and defining its jurisdiction, the United States permits aliens, who are proper parties to prosecute a claim of the character involved in a suit against the United States within the jurisdiction of the court, to institute and maintain a suit upon such claim in such manner and to the same extent as native citizens; nothing in the statutes limits suits by aliens to suits by individuals in their individual capacity, and a duly authorized alien executor of the estate of a deceased alien may sue in the same way as a citizen executor.

Right of alien under treaty.—Since any citizen may prosecute a suit in the Court of Claims, in his representative capacity, without obtaining ancillary letters of administration, the same right must be accorded to a citizen of Switzerland, under the treaty between the United States of America and the Swiss Confederation of May 24, 1850.

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Jurisdiction of Court of Claims with respect to suits by aliens.— Under the original jurisdictional act, empowering the Court of Claims to hear and determine all claims founded upon any law of Congress or upon any contract with the Government, the language is broad enough to include claims by aliens, and subsequent amendatory acts have not restricted the jurisdiction of the court in this particular. See *Wagner* v. *U. S.*, 5 C. Cls. 637.

Mr. Wm. P. Maloney and *Mr. Lewis E. Pennish* for the plaintiff.

Mr. Edward First, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Harry LeRoy Jones* was on the brief.

The facts sufficiently appear from the court's opinion.

LITTLETON, *Judge*, delivered the opinion of the court: The plaintiff, Julius Hartmann, a citizen of the Confederation of Switzerland and a resident of the city of Lucerne, instituted this suit as the duly appointed, qualified, and acting executor under the last will and testament of Annie C. Grun, deceased, who, until the time of her death on October 11, 1934, was a non-resident alien and a citizen of Switzerland residing at Lucerne. Annie C. Grun left a last will and testament, and codicil thereto, which were duly admitted to probate and established pursuant to the laws and usages of Switzerland and of the city of Lucerne, Switzerland, in the Probate Court of the city of Lucerne, the will being dated April 29, 1930, and the codicil thereto being dated September 20, 1934. The plaintiff, Julius Hartmann, who was named as executor in the will and codicil, was duly and legally appointed as such executor October 16, 1934, by the Probate Court of the city of Lucerne, Switzerland. The Probate Court possessed full and lawful jurisdiction to appoint plaintiff as such executor and, as such executor, plaintiff was, and is, authorized and empowered to collect, receive, and administer the property, rights, choses in action, causes of action, money, and other assets of the decedent's estate, including the right to enforce any alleged claim or claims, or causes of action, appertain-

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ing to the ownership of the property by the decedent, Annie C. Grun. Hartmann duly accepted the appointment as executor and continuously thereafter has been, and now is, the duly qualified, lawful, and acting executor of the estate of Annie C. Grun.

The facts upon which the suit is based are alleged in the petition and need not be stated here. The suit involves a claim for damages by reason of the refusal of the United States to pay to the estate of the decedent $1,420,000, the principal amount of the First Liberty Loan 3½%, gold bonds in United States gold coin of the standard value as of June 15, 1917, or to pay the estate the equivalent in legal tender currency in lieu of such gold coin; and further by reason of the failure of the defendant to pay the estate the total of the interest in United States gold coin or the equivalent in legal tender currency in lieu of such gold coin.

On May 5, 1930, the decedent became and, until her death, remained the legal and beneficial holder and owner of United States First Liberty Loan, 3½%, gold bonds in the principal amount of $1,420,000, payable as to principal and interest in United States gold coin of the standard value as of June 15, 1917. These bonds, in the principal amount mentioned, were registered in the name of Annie C. Grun and were duly delivered to her at her residence at Lucerne, Switzerland, and there remained in her possession up to and including the date of her death, after which possession and ownership of the bonds passed to plaintiff as executor.

Counsel for defendant filed a motion to dismiss the petition on the ground that Julius Hartmann, as an executor duly appointed by a court of Switzerland, is without capacity to sue the United States. After consideration of briefs and argument, the court entered an order November 1, 1937, overruling the motion to dismiss. Thereafter counsel for defendant filed a motion for reconsideration of the motion to dismiss and asked that the previous order overruling the motion to dismiss be vacated and set aside and that the petition be dismissed. The motion for reconsideration is based upon the same grounds and the same argument relied upon in support of the motion dismissed, except that

the motion alleges that the petition should be dismissed for the reason that it fails to allege that an executor appointed by a court of the United States has the right, in his representative capacity, to prosecute claims against the Confederation of Switzerland. We think the petition sufficiently alleges all the facts necessary to give this court jurisdiction if Julius Hartmann, a citizen of Switzerland, is entitled to institute and maintain this suit as executor of the estate of the decedent who was also, at the time of her death, a resident and citizen of Switzerland.

The argument in support of the motion to dismiss is based upon decisions which establish the rule that *in the absence of a statute permitting it*, an administrator or executor appointed in one state cannot sue, in his representative capacity, in the courts of another state. While admitting that an administrator or executor appointed in any state of the United States may institute and maintain a suit against the United States in this court in his representative capacity without securing ancillary letters of administration in any other state or the District of Columbia, it is, nevertheless, contended that this rule does not apply to the case at bar and that the first rule mentioned applies to suits in this court by an administrator or executor appointed under the laws of a foreign country. The defect in the arguments of counsel for the defendant in support of the motion to dismiss is that laws of the United States creating this court and defining its jurisdiction authorize this court to hear and determine *all claims*, and also authorize aliens to prosecute suits against the United States upon claims against our Government, of which claims this court, by reason of their subject matter, has jurisdiction. This is a clear and unequivocal statutory provision whereby the United States permits aliens, who are proper parties to prosecute a claim of the character involved in a suit against the United States within the jurisdiction of this court, to institute and maintain a suit upon such claim in the same manner and to the same extent as such claims might be instituted and maintained by native citizens. Nowhere in the statutes authorizing suits in this court is there to be found any provision which directly, or by implication, limits suits by aliens to suits brought by individuals

in their individual capacity, and we may not engraft upon the statute an exception that it shall not apply to suits instituted by an alien who is the legally appointed, qualified, acting executor of the estate of a deceased alien. We think it is clear that, with certain exceptions not material here, no distinction was intended to be made between suits in this court by native citizens, whether acting in an individual or representative capacity, and such suits by aliens. No good reason appears for such distinction and we think it is clear that if Congress had intended that such a distinction be made it would have so provided in language sufficiently clear not to be misunderstood. See *Borcherling* v. *United States*, 35 C. Cls. 311, 185 U. S. 223; *Rutherford* v. *United States*, 27 C. Cls. 539; *King, Administrator of Wilson*, v. *United States*, 27 C. Cls. 529; Beale on "Conflict of Laws" (1935), p. 1462, par. 467, 468; *Thomas* v. *United States*, 15 C. Cls. 335; *Hilton* v. *Guyot*, 159 U. S. 113, 133; *Pennoyer* v. *Neff*, 95 U. S. 714. In the last-mentioned case the court said that "Whilst they [United States courts] are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty exercising a distinct and independent jurisdiction."

Moreover, there is an additional reason for denying the motion to dismiss in the case at bar. In the treaty between the United States of America and the Swiss Confederation of November 24, 1850, it was provided in Art 1, as follows:

> The citizens of the United States of America and the citizens of Switzerland * * * shall have free access to the tribunals and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, * * *.

Inasmuch as any citizen of the United States may prosecute a suit in this court in his representative capacity without obtaining ancillary letters of administration in any other state or the District of Columbia, the same privilege must be granted to a citizen of Switzerland.

In addition to what has been stated above, it should be pointed out that the original jurisdictional act of the Court of Claims provided that "And the said court shall hear and determine *all claims* founded upon any law of Congress,

* * * or upon any contract, express or implied, with the government of the United States." [Italics supplied.] Clearly this language is broad enough to include claims not only by citizens of the United States but by aliens, whether suits upon such claims be instituted individually or in a representative capacity. See *Wagner* v. *United States*, 5 C. Cls. 637. Under the above-quoted jurisdictional Act of February 24, 1855, suits of the character here involved were clearly within the jurisdiction of the court, and that jurisdiction still continues and has never been modified except in certain particulars by the Act of March 12, 1863, 12 Stat. 820, 821, and the Act of July 27, 1868, 15 Stat. 243, not material here. See *United States* v. *New York & O. S. S. Co., Ltd.*, 216 Fed. 61, 64, in which the court said:

> In 1855 Congress created the Court of Claims (Act February 24, 1855, C. 122, 10 Stat. L. 612, 614) and conferred upon it jurisdiction to hear and determine "all claims" of the character enumerated in the Act. There was nothing in the Act distinguishing claims by aliens from claims brought by citizens. In 1863 Congress passed the captured and abandoned property act (Act March 12, 1863, C. 120, 12 Stat. L. 820, 821) which authorized "any person" who claimed as owner of any such property to prefer his claim for the proceeds thereof in the Court of Claims. Under this Act it was held that aliens could file such claims, and the Court appears to have been of the opinion that it had jurisdiction of any suit brought by an alien. *Scharfer's* case, 4 Ct. Cl. 529–532: *Wagner's* case, 5 Ct. Cls. 637, 638.
>
> In 1868 Congress forbade the bringing of any suit in any Court by an alien under the captured and abandoned property act. (Act July 27, 1868, C. 276, 15 Stat. L. 243). It contained, however, a provision that: "This section shall not be construed so as to deprive aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, of the privilege of prosecuting claims against the United States in the Court of Claims, as now provided by law."

The express grant of authority to this court to hear and determine all claims of the character specified, of which this claim is one, certainly cannot be construed to mean all claims

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except those made in a suit instituted by an alien as the duly appointed, qualified, and acting executor of the estate of a deceased alien citizen. The provisions of section 9 of the Act of March 3, 1863, supra, and the provisions of the Act of July 27, 1868, quoted in *United States* v. *New York & O. S. S. Co., Ltd., supra*, are evidences of the recognition by Congress that, prior to the dates mentioned, aliens had the right, without restriction, to prosecute in this court claims within its jurisdiction. Section 9 of the Act of 1863 took away the jurisdiction of this court of any claim against the United States in any suit instituted subsequent to December 1, 1863, growing out of or depending upon any treaty stipulation entered into with a foreign nation, and the Act of 1868 simply restricted the right of citizens of other governments to sue to those citizens whose government accorded American citizens the right to prosecute claims against such governments in their courts. After 1868 the jurisdiction of this court still extended to *all claims* founded upon any law of Congress or upon any contract with the United States, and such jurisdiction included, we think, by express provision of law, a suit by a non-resident alien citizen in his representative capacity. See *Vaughan* v. *Northrup*, 15 Peters 1.

The motion to vacate the order entered November 1, 1937, overruling the motion to dismiss is accordingly denied.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

A. G. BLANCHARD v. THE UNITED STATES

[No. 43199. Decided March 7, 1938. Motion for new trial overruled. May 2, 1938]

On the Proofs

Gold coin; breach of agreement; amount of recovery limited.—Where plaintiff in January, 1933, acquired $2,500 in gold coins of the United States, and not holding a Federal license to hold or deal in gold coin, thereafter in March, 1934, delivered such gold coins to the Government, in accordance with an alleged agreement with the United States District Attorney to dis-

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continue a prosecution for gold hoarding, and without publicity to ship the gold coins to the Federal Reserve bank, and where said gold coins were instead delivered to a local bank, resulting in publicity, it is held that even if the alleged agreement was made and was valid, its breach was immaterial and the plaintiff is not entitled to recover any greater amount than was paid to him. *Nortz* v. *U. S.*, 294 U. S. 317, 328.

The Reporter's statement of the case:

Mr. A. G. Blanchard, pro se.

Mr. Harry LeRoy Jones, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Edward First* was on the brief.

Plaintiff seeks to recover 53.675 ounces of United States gold coin with interest from March 1934, or an amount of currency sufficient to enable him to purchase this amount of gold coin in the world market.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a resident of Shreveport, Louisiana. On or before December 1, 1932, plaintiff purchased from the defendant gold coin of the United States of the face value of $2,500, being 125 coins of the denomination of $20, and paid therefor $2,500 by a certified or cashier's check.

The coin was sent by express to plaintiff's wife from New Orleans in or about January 1933, delivered by Mrs. Blanchard to the plaintiff, and plaintiff paid the express charges.

2. The Department of Justice, in September 1933, investigated the matter of possession of the gold coin so purchased and delivered, and as a result thereof Mrs. Blanchard was arrested on a gold hoarding charge in March 1934.

Plaintiff was anxious to have the prosecution dropped and employed an attorney, L. Percy Garrot, to negotiate to that end with the United States District Attorney, Philip H. Mecom, in charge of the prosecution. It was thereupon agreed that the hoarded gold coin would be surrendered, that payment therefor at face value, i. e., $2,500, would be

made, that the criminal prosecution against Mrs. Blanchard would be abandoned, and that in order to avoid publicity the gold coin would be expressed directly to a Federal Reserve Bank.

The plaintiff, pursuant to this agreement, thereafter turned over $2,500 in gold coin to his attorney, Garrot, and authorized him to deliver these coins to the United States Attorney. This delivery was made on March 31, 1934. Thereafter the United States Attorney, in view of the public, delivered the coins to the Commercial National Bank of Shreveport for shipment to a Federal Reserve Bank. The surrender of the gold coin was published in a local newspaper, but the United States Attorney made no statements to the press or in any manner directly caused this publicity.

On April 3, 1934, Mecom received a letter from the plaintiff reading in part as follows:

> Since you have broken your agreement by turning these coins over to a local bank, as reported in the Saturday afternoon edition of the Journal, I also renounce my part of the agreement, and wish to advise you that I renounce and repudiate my part of the agreement to accept $2,500.00 in currency for these coins, and I will not now accept anything less than the return of these identical coins or the sum of $4,375.00 in paper money, which it would cost me to replace the same.

However, on April 17, 1934, the plaintiff's attorney, acting in his client's behalf, and by his express authority given subsequent to April 3, 1934, received a cashier's check from the Commercial National Bank of Shreveport in the sum of $2,500, representing the proceeds of the gold coin surrendered. This sum, less an agreed attorney's fee, was remitted to the plaintiff, and the plaintiff retained this money. The criminal charge against Mrs. Blanchard was not thereafter prosecuted.

3. Plaintiff is, and was, a salesman engaged in selling oil machinery and air-conditioning equipment. The use of gold was and is not necessary in his business.

There is no proof in this case of the weight of the gold coin at the time of its return to the defendant, or the market

value thereof. At the time plaintiff was in possession of the gold coin he held neither a Federal license to hold gold coin nor one to hold gold bullion. The $2,400 in United States currency deposited to plaintiff's credit by plaintiff's attorney, Garrot, was taken by plaintiff to Mexico where he purchased 71.325 ounces of gold coin.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question in this case is whether the plaintiff, who acquired $2,500 in gold coins of the United States in January 1933, and who, not holding a Federal license to hold or deal in gold coin, thereafter, in March 1934, delivered such gold coins to the defendant and received therefor $2,500 in other currency of the United States, is entitled to receive any further sum from the United States.

Plaintiff urges that the gold coins in his possession were surrendered pursuant to an agreement with the United States District Attorney and that the part of this agreement to the effect that the gold coins would be expressed directly to a Federal Reserve Bank, in order to avoid publicity, was breached. If it be assumed that this promise was supported by an adequate consideration and that the United States Attorney was authorized to make it, it is clear that its breach is immaterial to the question whether plaintiff is entitled to recover any greater amount than was paid to him for the reason that, at best, it places plaintiff in the same position as one who involuntarily surrendered gold coin to the United States and received in payment therefor an equal face amount of legal tender currency. In these circumstances it is clear from *Nortz* v. *United States*, 294 U. S. 317, 328, that plaintiff is not entitled to recover. See, also, *Uebersee Finanz-Korporation Aktien Gesellschaft* v. *Rosen, et al.*, 83 Fed. (2d) 225, 230. In the *Nortz* case, *supra*, the holder of gold certificates had surrendered them and received in payment thereof an equal face amount of legal tender currency. The legislation and regulations which required this surrender were equally applicable to gold coin. Neither the

plaintiff in the *Nortz* case nor the plaintiff herein held a Federal license to hold gold coins. The court held in the *Nortz* case that the power of Congress to regulate the currency system of the country and to enact the legislation referred to "could not be successfully challenged" and that Nortz was not entitled to receive any sum in excess of the amount of the gold certificates surrendered.

The court further said:

> The asserted basis of plaintiff's claim for actual damages is that, by the terms of the gold certificates, he was entitled, on January 17, 1934, to receive gold coin. *It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him. But, in that event, he would have been required, under the applicable legislation and orders, forthwith to deliver the gold coin to the Treasury.* Plaintiff does not bring himself within any of the stated exceptions. [Italics ours.]

In the instant case plaintiff was in possession of gold coins from and after January 1933. He held no Federal license to hold gold coins and under the applicable legislation and regulations he was required to surrender all of his gold coins not later than January 17, 1934. Upon such surrender he was entitled to receive $2,500 in other coin or currency, or legal tender, for the same amount and nothing more. (See Act of March 9, 1933, 48 Stat. 1; Executive Order No. 6102, April 5, 1933; Orders of Secretary of the Treasury, December 28, 1933, and January 15, 1934.) Contrary to the Act of Congress, plaintiff retained possession of the gold coins until March 1934, when he surrendered them and received $2,500 in legal tender currency. We think it is clear under the decision in *Nortz* v. *United States*, *supra*, that plaintiff cannot recover any additional amount. The petition is, therefore, dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

SHERWOOD PICKING v. THE UNITED STATES

[No. 43308. Decided March 7, 1938]

On the Proofs

Transportation of dependents under Navy travel regulations.—Where Navy travel regulations provided that transportation for dependents will be furnished after receipt of orders involving a permanent change of station, but prior to receipt of subsequent orders involving another permanent change of station, and travel was not undertaken until after receipt of subsequent orders, it is held that the Navy regulations are valid.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Sherwood Picking, is an officer of the United States Navy, holding the rank of Commander.

2. On April 12, 1934, while plaintiff was stationed at the plant of the Electric Boat Company, New London Ship and Engine Works, Groton, Connecticut, as Naval Inspector of Machinery, he received orders issued by the Bureau of Navigation, Navy Department, on April 10, 1934, providing:

> 1. In accordance with the following instructions you will regard yourself detached from your present station, and from such other duty as may have been assigned you; will proceed and report for duty as indicated:
>
> On or about 15 May, 1934; to the commanding officer of the U. S. S. *Texas* for duty as first lieutenant and damage control officer.
>
> 2. You are hereby authorized to delay until 1 June 1934 in reporting in obedience to these orders.
>
> 3. Keep the Bureau of Navigation and your new station advised of your address.

> 4. This delay will count as leave. Upon the commencement of the leave you will immediately inform this bureau of the exact date and upon the expiration thereof you will return the attached form, giving the dates of commencement and expiration.

3. In compliance with these orders, plaintiff, on June 1, 1934, reported for duty aboard the U. S. S. *Texas*, which at that time was anchored in the harbor of New York, New York, although her Home Yard was Bremerton, Washington, and her Home Port, Los Angeles, California.

4. At the time of receipt of said orders, plaintiff's dependents, consisting of his wife, two daughters, 6 and 2 years of age respectively, and son, 4 years of age, were residing with him at New London, Connecticut. As the U. S. S. *Texas* was stationed on the East Coast, his dependents did not travel to either the Home Yard or the Home Port of the vessel, but instead traveled to plaintiff's permanent home at Portland, Maine.

5. On August 6, 1934, while on duty aboard the U. S. S. *Texas*, plaintiff received orders issued by the Bureau of Navigation, Navy Department, on August 4, 1934, providing:

> 1. When directed by your commanding officer you will regard yourself detached from duty on board the U. S. S. *Texas* and from such other duty as may have been assigned you; will proceed to Los Angeles, Calif., and take passage to Manila, P. I., via the Dollar Line.
>
> 2. Upon arrival at Manila, P. I., you will proceed to Cavite, P. I., and report to the Commandant, Sixteenth Naval District, and by letter to the Commander in Chief, Asiatic Fleet, for such duty as may be assigned you in submarines.
>
> 3. You are hereby authorized to delay until such time as will enable you to take passage via the Steamship *President Hayes* of the above mentioned line sailing on 27 August 1934.
>
> 4. Keep the Bureau of Navigation advised of your address.
>
> 5. This delay will count as leave. Upon the commencement of the leave you will immediately inform this bureau of the exact date and upon the expiration thereof you will return the attached form, giving the dates of commencement and expiration.

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6. The Bureau of Navigation will furnish the steamer transportation from Los Angeles, Calif., to Manila, P. I.

7. Upon arrival at Los Angeles, Calif., you will inform the Officer in Charge, Navy Freight Office, San Pedro, Calif., the date of your sailing in order that he may forward this information by despatch to the Commander in Chief, Asiatic Fleet.

6. In compliance with the orders of August 4, 1934, plaintiff was relieved from duty aboard the U. S. S. *Texas* and proceeded to his home at Portland, Maine, where he received orders issued by the Bureau of Navigation, Navy Department, on August 14, 1934, providing:

1. You are hereby authorized to delay until such time as will enable you to take passage via the Steamship *President Johnson* of the Dollar Line sailing from Los Angeles, Calif., on 10 September 1934, instead of sailing on 27 August 1934.

2. Keep the Bureau of Navigation advised of your address.

3. This delay will count as leave. Upon the commencement of the leave you will immediately inform this bureau of the exact date and upon the expiration thereof you will return the attached form giving the dates of commencement and expiration.

7. Plaintiff requested transportation for his dependents from Portland, Maine, to the West Coast, but his request being refused by the defendant he provided for their transportation to Los Angeles, California, at his own expense, the travel being undertaken by train on September 5, 1934, and completed September 10, 1934.

8. Defendant supplied transportation for plaintiff's dependents from Los Angeles, California, to Manila, Philippine Islands.

9. Plaintiff filed claim for reimbursement of the expense he incurred in transporting his dependents from Groton, Connecticut, to Los Angeles, California, but it was disallowed.

10. If plaintiff is entitled to reimbursement for the costs of transporting his dependent from Groton, Connecticut, to Los Angeles, California, there is due him the sum of $200.30.

The court decided that the plaintiff was not entitled to recover.

MEMORANDUM

The statutes involved in this case are Section 12 of the act of May 18, 1920 (41 Stat. 604), which reads as follows:

> That hereafter when any commissioned officer, * * * having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of * * * the Navy * * * to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term "permanent station," as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; * * *

and Section 12 of the act of June 10, 1922 (42 Stat. 631), as follows:

> In lieu of the transportation in kind authorized by section 12 of an act * * * approved May 18, 1920, to be furnished by the United States for dependents, the President may authorize the payment in money of amounts equal to such commercial transportation costs when such travel shall have been completed. * * *.

The following Executive Order, No. 3726, was issued August 25, 1922:

> For the purpose of carrying into effect the provisions of the second paragraph of section 12 of an act * * * approved June 10, 1922, the Secretary of War, the Secretary of the Navy, * * * are hereby authorized to make payments in money for the cost of travel of dependents of officers and enlisted men by commercial carrier in lieu of transportation in kind authorized by section 12 of an act * * * approved May 18, 1920, when such travel shall have been completed under such regulations as they may severally prescribe for the services under their charge,

and this was followed by the Executive Order of August 13, 1924, set out below:

> I. (e) The term "permanent station" as used in this Act shall be construed to mean * * * the home

yard or the home port of a vessel on which an officer is required to perform duty, under orders in each case which do not in terms provide for the termination thereof; * * *.

The Navy Regulations involved are contained in Section 1814, entitled "Transportation of Dependents," and we quote the following provisions:

(1) When any commissioned officer, * * * having a wife or dependent child or children is ordered to make a permanent change of station, the United States shall furnish transportation in kind by the shortest usually traveled route, payable from funds appropriated for the transportation of the Navy to his new station for the wife and dependent child or children (Sec. 12, Act of May 18, 1920).

(2) The home yard of the ship to which an officer * * * may be attached is his permanent station, and a duly authorized change in the home yard or home port of such vessel shall be deemed a change of station (Sec. 12, Act of May 18, 1920).

Paragraph 4–12, Navy travel instructions, is as follows:

When transportation will be issued.—Transportation for dependents as authorized by law will be furnished at any time after receipt of orders involving a permanent change of station, *but prior to receipt of subsequent orders involving another permanent change of station*, by officers authorized to issue transportation, upon presentation of an application by the officer * * * concerned setting forth the transportation needed. (Art. 1818 (4) N. R.) In the event it is impracticable for dependents to move to the officer's * * * new station within 60 days after detachment from old station, and orders are issued within 60 days for a further change of station prior to the departure of the dependents for the first station, dependents may be furnished transportation to the officer's latest station via a direct usually traveled route. [Italics supplied.]

To award the plaintiff a judgment in this case the court would be required to hold that the quoted Navy Regulations are invalid, and this, under the law, we are unable to do, and the plaintiff's petition is dismissed. It is so ordered.

STEINER B. HURD, FORMERLY STEINER B. STEINER, EXECUTRIX OF THE ESTATE OF EUGENE STEINER, DECEASED, v. THE UNITED STATES

[No. 43362. Decided March 7, 1938]

On the Proofs

Income tax; taxable income of husband under Texas constitution and statutes.—Under the Texas constitution and statutes, in effect at the time, it is held that income of the husband in 1928 derived from propery acquired by him after marriage by gift, devise, or descent was at that time his separate property and taxable to him alone.

Same, constitutionality of Texas statute.—The Texas statute of 1925 providing that "the rents and revenues derived" from real property of the husband acquired by him after marriage "by gift, devise or descent * * * shall be his separate property" held not to be in conflict with the constitution of the State of Texas, in accordance with the holdings of the courts of that State.

Same; repeal of statute.—Passage in 1929 of an Act by the Texas legislature, which had the effect of repealing the provision with reference to the husband's separate estate, is held not to affect the taxable status of the taxpayer in 1928.

The Reporter's statement of the case:

Mr. Robert A. Littleton for plaintiff.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

Upon the stipulation of the parties, the court made special findings of fact as follows:

1. The plaintiff, Steiner B. Hurd, formerly Steiner B. Steiner, is the executrix of the estate of Eugene Steiner, who died in the month of January 1932; plaintiff is also the widow of Eugene Steiner, and under his will the sole beneficiary of his estate.

2. Eugene Steiner was one of two children of Lillie B. Steiner, who died in the month of August 1927, the other child being Adele S. Fisher. The estate of Lillie B. Steiner

consisted of real property, situated in the County of McLennan, State of Texas, and upon the death of Lillie B. Steiner was inherited by Eugene Steiner and his sister, Adele S. Fisher, and thereafter operated as a jointly owned property under the management of J. W. Price.

3. During the year 1928 the net distributable income derived from the property owned and held by Eugene Steiner and his sister, Adele S. Fisher, in two equal undivided parts, amounted to the sum of $40,991.29 of which a one-half share, or $20,495.64, was income of the said Eugene Steiner and the other one-half share, or $20,495.64, was income of Adele S. Fisher.

4. In reporting the taxable income derived from said jointly owned property for the year 1928, Eugene Steiner, Adele S. Fisher, and the plaintiff, as the wife of Eugene Steiner, reported the income from the property as partnership income distributable to them in three equal parts. The amount of said income reported by Eugene Steiner was the sum of $6,235.81, upon which he paid a tax of $57.14.

5. Eugene Steiner and his wife, Steiner B. Steiner, now Steiner B. Hurd, filed separated returns for the year 1928, but when the Commissioner examined the information return of the partnership of Eugene Steiner, Adele S. Fisher and Steiner B. Steiner, he held that the income reported was in fact derived from jointly owned property of Eugene Steiner and Adele S. Fisher in the net distributable amount of $40,991.29 for the year 1928 and that such income was taxable to Eugene Steiner and Adele S. Fisher in equal one-half parts each.

6. The net income of $6,235.81 reported by Eugene Steiner for the year 1928 was increased by the Commissioner of Internal Revenue in the amount of $13,527.37 and a deficiency in tax of $722.42 was assessed against Eugene Steiner and subsequently paid by him on December 11, 1931, together with interest accrued in the amount of $94.86. The amount of tax assessed against Eugene Steiner for the year 1928 is the sum of $779.56, of which $57.14 was assessed and paid at the time he filed his return for the year 1928.

7. On April 27, 1932, the plaintiff, as executrix of the estate of Eugene Steiner, the said Eugene Steiner having

died subsequent to the year 1928, filed a claim for refund of $704.64 collected from Eugene Steiner as taxes on his net income for the year 1928. The ground of the claim for refund is that the net income upon which a tax of $779.56 was assessed and collected from Eugene Steiner for the year 1928 was community income under the law of the State of Texas, and that only one-half of the net income of $19,763.18, determined by the Commissioner as the net income of Eugene Steiner for the year 1928, should be taxed as income to him. On November 17, 1932, the claim was rejected.

8. On April 4, 1934, the plaintiff, as the executrix of the estate of Eugene Steiner, filed an application with the Commissioner of Internal Revenue requesting that the claim for refund of November 8, 1932, be reopened and reconsidered on the basis of a decision of the United States Circuit Court of Appeals for the Fifth Circuit, rendered March 24, 1934, in the case of *Commissioner* v. *Anna Davis Terry*, 69 Fed. (2d) 969.

9. On April 20, 1934, the Commissioner of Internal Revenue acknowledged receipt of the application of April 4, 1934, to reopen the claim. On June 27, 1934, the Commissioner wrote a letter to the attorney and legal representative of the plaintiff which indicated the action taken by the Commissioner on the application of April 4, 1934. A copy of this letter is attached to the petition herein marked Exhibit "B" and made part hereof by reference.

10. On May 7, 1935, James A. Councilor, attorney-in-fact for the estate of Eugene B. Steiner, addressed a communication to the Commissioner of Internal Revenue in which he requested that in view of the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner* v. *Wilson*, 76 Fed. (2d) 766, decided April 4, 1935, that the Commissioner recede from the position taken by him in the letter of June 27, 1934, denying the application for the reopening of the claim for refund for the year 1928 on the basis of the invalidity of Section 4613 of the Revised Statutes of Texas, 1925.

11. It is agreed between the parties that if the Court holds that the net income of Eugene Steiner for the year 1928

is community income under the laws of Texas, the tax liability of the said Eugene Steiner on his one-half part of said community income for the year 1928 is $166.51; and that there would be an overpayment of tax and interest for the year 1928 in the amount of $695.26 with interest from December 11, 1931. That the tax liability of the plaintiff, as the wife of Eugene Steiner, on her part of the community income for the year 1928 is $166.51, of which $57.14 has been paid on 3/13/29.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff and her former husband [the taxpayer], now deceased, were citizens of the State of Texas during the period under consideration.

Two questions are involved in this case: One is whether the income of the husband derived in 1928 from rents of property acquired by him after marriage by gift, devise, or descent was at that time his separate property and taxable to him alone. The other is whether the claim for refund made by plaintiff was reconsidered so as to extend the period of limitations for recovery of an overpayment.

The determination of the first of these questions requires a construction of the constitution of the State of Texas and the validity thereunder of a statute enacted by the legislature of that State in 1925 by Article 4613 which provides that "the rents and revenues derived" from real property of the husband acquired by him after marriage "by gift, devise, or descent * * * shall be his separate property."

The income upon which the tax in controversy was levied was derived by the husband from real property acquired by descent. The Commissioner, in accordance with the terms of this statute, did not regard this income as community property but assessed the tax against the husband upon the basis of his being the owner in entirety. The plaintiff, however, contends that Article 4613 was invalid under the constitution of the State of Texas.

The question thus raised must be determined in accordance with the holdings of the courts of that State. It is true that *Arnold* v. *Leonard*, 114 Tex. 535, 273 S. W. 799, held a similar provision unconstitutional as to the wife's separate estate under certain provisions of the constitution, but enforced another part of the same statute. Subsequently in *Stephens* v. *Stephens*, 292 S. W. 290 [decided Feb. 23, 1927], the provision quoted from Article 4613 was considered. The opinion stated:

> On February 10, 1921, the date of the marriage between appellee and appellant, the law of 1917 (Laws 1917, c. 194), providing that the rents and revenues from the separate land from either spouse should be separate property, had been passed. This law, and the 1921 amendment thereto (Laws 1921, c. 130), on the account of the insufficiency of the caption to the bill, were held invalid. It was also held unconstitutional as to the wife's separate estate, as her separate property rights could neither be increased nor diminished because defined and fixed by section 15, art. 16, of the Constitution of the state. *Arnold* v. *Leonard*, 114 Tex. 535, 273 S. W. 799.
>
> The Constitution does not define the separate rights of the husband. The 1925 Compiled Statutes of Texas, art. 4613, adopted by the Legislature, reenacted the provision making the rents and revenues from the husband's separate land the separate property of the husband, and, in our opinion, cures the defective caption to the bill.

In the case last cited the question was whether oil derived from land which was the separate property of the husband was community property. The court went on to say that the record showed that a large portion of the oil in controversy for which pay was received was delivered "after Article 4613 of the 1925 statutes became effective," but in its final decision made a ruling which rendered it unnecessary to apply the provisions of that article. Nevertheless, we think the clear implication of the decision is that the provision under consideration was constitutional as to the property of the husband.

Plaintiff relies to some extent upon *Commissioner* v. *Terry*, 69 Fed. (2d) 969 [decided March 24, 1934], in which the Circuit Court of Appeals for the Fifth Circuit held that

income from the wife's separate property in Texas was community income in which each spouse had a half interest and was taxable one-half to each, but it will be observed that this is a different question from the one involved in the case at bar, the determination of which is controlled by the case of *Stephens* v. *Stephens*, *supra.*

Plaintiff relies mainly upon the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Wilson*, 76 Fed. (2d) 766 [decided April 4, 1935]. In that case the court held that the provision of Article 4613 was unconstitutional in so far as it undertakes to make the "rents and revenues derived" from the separate property of the husband his separate property. We think the opinion in the case last cited does not give sufficient weight to the decisions of the Texas courts, and the fact that the constitution contains nothing forbidding such legislation. Consequently, we are unable to agree in the conclusion expressed therein.

As part of the reason for the decision made in the case last cited it is stated that the course of legislation in Texas indicates a purpose to treat the husband and wife alike in fixing their separate estates as against the community. This may be granted, but we think it affords no reason for holding provisions invalid which do not conflict with the constitution. *Hopkins* v. *Bacon*, 282 U. S. 122, cited in the decision of the Circuit Court of Appeals, in our opinion, has no bearing as it dealt with what was conceded to be community property and the question to be determined was altogether different from the one involved in the case before us. The Texas legislature in 1929 passed an act to amend Articles 4613 and 4614 which had the effect of repealing the provisions with reference to the husband's separate estate as of the date of its enactment. But this action, as we think, merely tends to show that the legislature considered the provisions of Article 4613 as valid with reference to the husband's estate and in accordance with the "course of legislation" enacted the amendment in order that husband and wife might be treated alike. This amendment would not affect the taxable status of the taxpayer during the year for which the tax was assessed.

It follows from what we have said above that the challenged acts of the Commissioner of Internal Revenue must be sustained. This conclusion makes it unnecessary that we should pass upon the other questions raised and discussed by the respective parties, and the petition must be dismissed.

WHALEY, *Judge;* WILLIAMS, *Judge;* and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, did not hear this case and took no part in its decision.

EMANUEL BRATSES v. THE UNITED STATES

[No. 43394. Decided March 7, 1938]

On the Proofs

Suit for damages under special jurisdictional Act; negligence.—Where accident to plaintiff was solely due to the negligent act of contracting company foreman in ordering the plaintiff to a dangerous and hazardous position, in a restricted and prohibited area of the Brooklyn Navy Yard, without the consent or knowledge of any officer, agent or employe of the Government, it is held that plaintiff has no right of recovery against the Government.

The Reporter's statement of the case:

Mr. T. Henry Walnut for the plaintiff.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Suit herein is brought by plaintiff, Emanuel Bratses, under the following jurisdictional Act, approved by the President June 24, 1936:

(PRIVATE—No. 680—74TH CONGRESS)

(H. R. 3866)

AN ACT

To Confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Emanuel Bratses

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claim of Emanuel Bratses for injuries and damages sustained in an accident in which he lost his leg at the Brooklyn Navy Yard, Brooklyn, New York, on May 27, 1933: *Provided*, That proceedings in any suit brought in the Court of Claims under this Act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which said court has jurisdiction under section 145 of the Judicial Code, as amended: *Provided further*, That the judgment, if any, shall not exceed the sum of $5,000.

Plaintiff is 56 years of age, resides at Brooklyn, New York, and during the period here involved was a structural steel painter.

2. On April 20, 1933, the United States, by its contracting officer, A. L. Parsons, Chief of the Bureau of Yards & Docks, Department of the Navy, entered into a contract with Pamfilis Contracting Company for painting crane runways and cranes of buildingways Nos. 1 and 2, Navy Yard, Brooklyn. A copy of the contract is filed in the case as defendant's Exhibit No. 1, and is made part hereof by reference.

Sections 1–12 of the contract specifications provided as follows:

1–12. *Hours of work.*—The work shall be undertaken and completed in such order as to cause the least interference with Government operations on the buildingways, as determined by the Officer-in-Charge. It is expected that Buildingways No. 2 will be free of all ship construction work and available for painting after about 24 April, 1933. There will be ship construction under way on Buildingways No. 1, erection work in the assembly area, and material handling in the stock yard, probably during the entire period of the contract to be based upon this specification. Painting work may not be carried on during working hours over any of the areas where Government work is in progress. Work over such areas shall be done during daylight hours outside of Navy Yard working hours and on any days or parts of days, other than Sundays or National Holidays, when the Navy Yard may be closed. Painting of legs of towers, or other parts of Ways No. 1 may be

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carried on during Navy Yard working hours provided there are no men working below and provided the contractor places a barricade to prevent men from walking under the work. Cranes of Ways No. 1 while not in use will be made available at one end of the Ways for painting where practicable.

3. Plaintiff entered the employ of Pamfilis Contracting Company in the fore part of May 1933 and thereafter was engaged on the contract work as a painter. He had had many years of experience as a painter and was proficient in the painting of structural steel. At the time of the accident hereinafter described he was receiving wages of $35 a week.

4. On the morning of Saturday, May 27, 1933, at about 8 o'clock, plaintiff reported to his foreman, likewise an employee of Pamfilis Contracting Co., for work. At that time plaintiff had been working in the yard two or three weeks. He and his foreman well knew the working conditions, and in particular that construction work was going on in Buildingways No. 1.

The foreman directed him to paint in Buildingways No. 1 from an anchored 40-ton crane eastward on a steel beam supporting the south rail on which the crane ran east and west. At this time there was ship construction under way in Buildingways No. 1. It was the custom and duty of the company's foreman to consult with the Government inspectors in charge of the painting immediately before assigning his men to their several places each morning and get permission from the inspectors to prosecute the work where desired. On this particular morning the foreman failed and neglected to perform this duty and assigned plaintiff to this location without the knowledge or consent of any of defendant's officers.

5. Plaintiff started to work in the place assigned him and began close up to and in front of the forward wheel of the crane, under the framework of the crane, and in such a position that he was concealed from the sight of the operator of the crane. The operator of the crane was a Government employee.

The operator arrived at the crane soon after plaintiff's arrival. He did not see the plaintiff and could not have seen him without an extraordinary inspection. He had no reason to suppose and did not know that plaintiff was working in the vicinity of the crane.

The operator put the crane in motion before plaintiff had worked clear of the crane, and the wheel in front of which plaintiff was working rolled on to and injured plaintiff's left leg. The operator stopped after going 6 or 8 feet upon hearing cries of distress, and backed up. Plaintiff was taken to a hospital and immediately underwent a necessary amputation of his left leg just above the knee, and has since been incapacitated for work as a structural steel painter.

6. Prior to institution of suit in this court the plaintiff brought suit against Pamfilis Contracting Co. in the Baltimore City Court, for damages due to the same injury. On September 17, 1935, the plaintiff in writing acknowledged the receipt from Pamfilis Contracting Co. of $1,000 as consideration for release of the company from liability to plaintiff for damages resulting from the injury, and the suit in the Baltimore City Court was terminated. The release contained a recitation to the effect that Pamfilis Contracting Co. was apparently not financially good for more, that a judgment could not be collected from the surety upon the bond on the Government contract, and that there was pending in Congress the jurisdictional act hereinabove set out, "it being alleged that they [the injuries] were due to the negligence of an employee of the United States Government," plaintiff believing that $1,000 was not a fair and reasonable compensation to him for the injury.

7. The injuries sustained by the plaintiff resulted from the assignment of plaintiff by the foreman of Pamfilis Contracting Co. to a dangerous and hazardous spot in an area prohibited at the time to his company by the express terms of its contract with the United States, and were not due to negligence on the part of any officer, agent, or employee of the United States, or any contribution on their part to the negligence of any other person.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This case comes to this court under an act of Congress approved June 24, 1936, conferring jurisdiction "to hear, determine, and render judgment upon the claim of Emanuel Bratses for injuries and damages sustained in an accident in which he lost his leg at the Brooklyn Navy Yard, Brooklyn, New York, on May 27, 1933," 49 Stat. 2348. Jurisdiction is specially conferred on this court to hear and determine a case sounding in tort.

The plaintiff was employed as a structural painter by the Pamfilis Contracting Company which had entered into a contract with the defendant to paint crane runways and cranes of buildingways Nos. 1 and 2, Navy Yard, Brooklyn, New York. It was especially provided in the contract that ship construction would be under way on buildingways No. 1, probably during the entire period of the contract and painting work was prohibited on these ways during working hours. The work on buildingways No. 1 could only be done "during daylight hours outside of Navy Yard working hours and on any days or parts of days, other than Sundays or National Holidays, when the Navy Yard may be closed."

The Pamfilis Contracting Company had a foreman in charge of the work who received his orders each morning at 8 o'clock where the painting work should be done from the Yard Supervisor or his assistant. Both the foreman and the plaintiff knew construction work was being done on buildingways No. 1 during the period they had been working in the yard. On the morning of Saturday, May 27, 1933, the foreman of the Pamfilis Contracting Company, without the knowledge, consent, or acquiescence of any officer, agent, or employee of the defendant ordered the plaintiff to work in a dangerous and hazardous position on buildingways No. 1 and, after he had been in this position for a short time, the operator on the crane of buildingways No. 1 started his engine with the result that the

plaintiff's leg was run over and crushed and had to be amputated. The operator of the crane did not see the plaintiff before or when he started his crane and had no reason to believe or know that plaintiff was working on buildingways No. 1. The cause of the accident to plaintiff was solely due to the negligent act of the foreman of the Pamfilis Contracting Company in ordering the plaintiff to a dangerous and hazardous position in a restricted and prohibited area without the consent or knowledge of any officer, agent, or employee of the defendant. The evidence clearly shows that no officer, agent, or employee of the defendant caused or contributed to cause the injuries received by the plaintiff. Without some failure of duty on the part of the defendant or negligent act on the part of its officers, agents, or employees, the defendant is not liable.

There can be no recovery and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HARRY L. FERGUSON v. THE UNITED STATES

[No. 43455. Decided March 7, 1938]

On the Proofs

Commutation of accumulated leave, employe Panama Canal Service.—Employe of Panama Canal Service, on retirement for age, held to be entitled to commutation of accumulated leave under valid Executive Order. *Greene* v. *U. S.*, 85 C. Cls. 548.

The Reporter's statement of the case:

Mr. George A. King and *King & King* for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiff, a former employee of the Panama Canal Service, seeks to recover $749.17 for commutation of the number of

days of accumulated leave due him at the termination of his service by retirement on account of age. Executive Order of January 15, 1917, relating to conditions of employment in the Panama Canal Service permits cash payment for cumulative annual leave at termination of service not to exceed 120 days. The Comptroller General held that the regulation providing for cash payment in commutation of leave at the termination of an employee's service, adopted and promulgated with the approval of the President, was invalid and without authority of law.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of the United States and, during the period January 18, 1908, to March 31, 1935, involved in this suit, he was a resident of the Canal Zone at Panama. During the period mentioned he was employed by the Panama Railroad Company and the Panama Canal in various capacities. January 18, 1908, he was appointed a foreman to the Isthmian Canal Commission in the Canal Zone and so continued until November 16, 1911, when he became a foreman in the service of the Panama Railroad Company in the Canal Zone. His employment in this capacity continued until March 26, 1921, when he was appointed a foreman in the Panama Canal Zone and so continued in this capacity until March 31, 1935, when he was automatically separated from the service and retired on account of age.

At the time of plaintiff's retirement from the service in the Panama Canal as such foreman, there had accrued to him 119½ days cumulative leave, of which he was paid for nine days at the time of his retirement, leaving 110½ days to his credit for which no payment has been made.

2. Circular No. 602–35 issued by the Executive Office of the Panama Canal on March 28, 1924, republishing, with interpretative rules, the leave regulations established, effective December 31, 1916, by the Executive Order of January 15, 1917, "Relating to Conditions of Employment in the Panama Canal Service" applying to all employees who

are citizens of the United States, etc., provided in part as follows:

EXECUTIVE ORDER

ANNUAL LEAVE

22. Twenty-four days annual leave will be allowed each employee for each year after entry into service, and any annual leave not used prior to the end of the service year in which it is earned shall be thereafter in the same status and subject to the same rules as cumulative leave.

CUMULATIVE LEAVE

29. Thirty days cumulative leave will be allowed each employee, paid on a monthly or annual basis for each year of his service, and twenty days to each employee paid on an hourly basis. This leave will be due after completing ten months' service each year and may be taken when the employee's service can be spared. It may be taken annually or left to accumulate to the credit of the employee, provided, however, that the maximum number of days' leave with pay of all kinds which may be granted at any one time, or which may be commuted into a cash payment at termination of service is 120.

31. Leave taken after the close of the service year in which it was earned shall be paid for at the rate of pay received at the end of the tenth month of the service year in which the leave was earned. When an employee enters on a leave of absence which consists of or includes annual leave earned in the same year in which he enters on the leave, such annual leave shall be paid for at the rate received by the employee when he entered on the leave.

35. After accumulating leave of all kinds amounting to 120 days, an employee ceases to earn additional cumulative leave until he is granted all or part of the cumulative leave already earned, unless he shall enter on cumulative leave within two months thereafter, or be ordered by the Governor to defer taking leave for official reasons.

36. When an employee's service is terminated, a cash payment in commutation of leave will be made to him for the number of days of cumulative leave due, plus the annual leave due. In the event of his death his estate will be paid the sum due.

Syllabus

3. If plaintiff was entitled to the commuted value of his unused leave at the time of his retirement as foreman in the service of the Panama Canal, there is due him $788.60, reduced in the amount of $39.43, representing 5% as required by the Economy Act of March 20, 1933, as amended, leaving a net cash commuted value of $749.17.

The Panama Canal Administration endeavored to pay plaintiff upon his retirement for the accumulated leave in accordance with the regulation adopted and promulgated by authority of the President of the United States, but the Comptroller General of the United States refused to permit this to be done.

The court decided that the plaintiff was entitled to recover.

Per curiam: The question presented in this case is controlled by the decision of this court in *Roger H. Greene* v. *United States*, decided June 7, 1937, 85 C. Cls. 548, in which it was held that an employee of the Panama Canal serving under similar conditions whose service was terminated by resignation was entitled to commuted value of his cumulative leave at the time of his separation from the service.

Judgment will, therefore, be entered in favor of plaintiff for the amount claimed. It is so ordered.

ELMER E. MILLER v. THE UNITED STATES

[No. 43625. Decided March 7, 1938]

On the Proofs

Salary of statutory office; curtailment of authorized pay by appropriation Act.—Where the salary of a Government office was specifically fixed by the statute creating the position and the appropriation Acts of 1921, 1922, 1923, not having repealed this provision, carried an insufficient appropriation to fulfill the statutory demand, it is held that the holder of such office is entitled to recover.

The Reporter's statement of the case:

Mr. Edward C. Finney for the plaintiff. *Mr. William G. Feely* was on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Upon the stipulation entered into by the parties, the court made special findings of fact as follows:

1. The plaintiff Elmer E. Miller, a citizen of the United States, was appointed as "Disbursing Clerk for the Payment of Pensions" May 9, 1921, took the oath of office on May 13, 1921, and assumed or commenced the duties of "Disbursing Clerk for the Payment of Pensions" May 16, 1921.

2. From May 16, 1921, to and including June 30, 1921, plaintiff served as and performed the duties of "Disbursing Clerk for the Payment of Pensions" and was paid therefor a salary at the rate of four thousand ($4,000.00) dollars per annum.

3. Beginning July 1, 1921, to and including June 30, 1924, plaintiff served as and performed the duties of "Disbursing Clerk for the Payment of Pensions" and was paid therefor a salary at the rate of three thousand ($3,000.00) dollars per annum.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

In the act of August 17, 1912, 37 Stat. 311, 313, Congress centralized all pension agencies in Washington and repealed the prior law, which provided agencies at a number of places throughout the United States. Among other provisions in the new plan, the Act provided for and created the office or position of Disbursing Clerk for the payment of pensions in the following language:

> For salary of one disbursing clerk for the payment of pensions, to be selected and appointed by the Secretary of the Interior, at the rate of four thousand dollars per annum, during the last five months of the fiscal year nineteen hundred and thirteen, one thousand six hundred and sixty-six dollars and sixty-seven cents; and from and after the thirty-first day of January, nine-

> teen hundred and thirteen, there shall be one disbursing clerk in the Bureau of Pensions to be appointed as aforesaid and who shall receive a salary at the rate of four thousand dollars per annum; and section forty-seven hundred and seventy-eight of the Revised Statutes of the United States authorizing the appointment of agents for the payment of pensions, and section forty-seven hundred and eighty of the Revised Statutes of the United States, authorizing the establishment of agencies by the President of the United States are hereby repealed to take effect from and after the thirty-first day of January, nineteen hundred and thirteen, and the existing pension agencies are abolished from and after said date.

This act is definite in establishing a statutory office with a specific salary attached to it.

On May 9, 1921, the plaintiff was duly appointed by the Secretary of the Interior to the position of Disbursing Clerk for the payment of pensions and on May 13, 1921, took the oath of office and on May 16, 1921, assumed the duties of disbursing clerk at the salary of four thousand dollars ($4,000) per year. From May 16, 1921, to the end of the fiscal year the plaintiff was paid and received the salary of the office at the rate of $4,000 per year.

The plaintiff continued as disbursing clerk for the payment of pensions and performed the duties of the office for the next three fiscal years but was paid salary at the rate of three thousand dollars per annum. This was due to the fact that in the appropriation acts of 1921, 1922, and 1923, making provision for the payment of salaries for the pension office, the Congress only provided three thousand dollars per annum for the salary of the disbursing clerk for the payment of pensions. 41 Stat. 1252, 1289; 42 Stat. 552, 580; 42 Stat. 1174, 1202. After providing salaries for other positions in each of the above acts it says: "Disbursing clerk for the payment of pensions, $3,000 * * *."

This suit is brought under a special act of Congress which waives the statute of limitations and gives the plaintiff the right to sue for any unpaid part of his salary for the three years above stated. Private Act No. 158, 75th Congress, Chapter 354, First Session (50 Stat. 994).

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The plaintiff claims that he occupied a position the salary of which was fixed by the authorization act, and that he is entitled to recover the difference between the fixed salary and the amount appropriated as salary for the position by the respective appropriation acts for the years in question.

An examination of the Appropriation Acts for the three years 1921, 1922, and 1923 shows that they do not contain any repealing clause or any words which can be construed as an implied repeal of the Act of 1912, *supra*. There is no clause that the amount was in full payment of the salary of the position. This court has held that, where an office is established by statute and has a specific salary attached to it, the legal incumbent is entitled to the salary, though Congress may appropriate a less amount. *Thomas P. Smith* v. *United States*, 37 C. Cls. 119.

The case of *John M. Langston*, which arose in this court and was taken to the Supreme Court and affirmed, is in all points similar to the instant case. In that case, *United States* v. *John M. Langston*, 118 U. S. 389, 394, the court said:

> The salary of the minister to Hayti was originally fixed at the sum of $7,500. Neither of the Acts appropriating $5,000 for his benefit, during the fiscal years in question, contains any language to the effect that such sum shall be "in full compensation" for those years; nor was there in either of them an appropriation of money "for additional pay"; from which it might be inferred that Congress intended to repeal the Act fixing his annual salary at $7,500. Repeals by implication are not favored. It can not be said that there is a positive repugnance between the old and the new statutes in question. If by any reasonable construction they can be made to stand together, our duty is to give effect to the provisions of each. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *State* v. *Stoll*, 17 Wall. 425, 430; *Ex parte Yerger*, 8 Wall. 85, 105; *Ex parte Crow Dog*, 109 U. S. 556, 570.

Concluding its opinion the Court said:

> While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time,

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should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law.

The principle announced in the case of *Langston* v. *United States*, *supra*, was quoted with approval and followed in the case of *United States* v. *Vulte*, 233 U. S. 509, 515, where the Court said:

> The exceptions, it is to be remembered, were in appropriation acts, and no words were used to indicate any other purpose than the disbursement of a sum of money for the particular fiscal years. This court has had occasion to deal with such instances of legislation and their intended effect on existing law. In *United States* v. *Langston*, 118 U. S. 389, 394, it was decided that a statute which fixed the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years, and which contained no words that expressly or by clear implication modified or repealed the previous law. See also *Minis* v. *United States*, 15 Pet. 423, 445, where it is said: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." This follows naturally, from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.
>
> The ruling in the *Langston* and *Minis* cases is not opposed by the cases cited by the government. In all of them there was something more than the mere omission to appropriate a sufficient sum. There were expressions indicating a broader purpose. In two of them, *United States* v. *Fisher*, 109 U. S. 143, and *United States* v. *Mitchell*, 109 U. S. 146, it was intimated that the law was only suspended for the particular years. In another, *Wallace* v. *United States*, 133 U. S. 180, it was held that the appropriation constituted the law

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which prescribed the compensation of the office. And in all of them the *Langston* case was referred to and not disturbed or modified.

The salary of the office was specifically fixed by statute creating the position and the acts of 1921, 1922, 1923, not having repealed this provision of the law, must be held to have simply made an insufficient appropriation to fulfill a statutory demand. The plaintiff is entitled to recover the sum of $3,000. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS v. THE UNITED STATES

[No. E-344. Decided April 4, 1938]

On the Proofs

Indian land claims; special jurisdictional act of May 26, 1920; additional compensation for lands; instant claim not within the jurisdictional act.—In the instant case it is held that the plaintiffs' claim for additional compensation for 621,824 acres of land, ceded to the defendant, on the ground that the payment therefor was inadequate, does not come within the jurisdictional act, the agreement of 1901 and the release executed thereunder having accomplished a complete settlement of all claims of plaintiffs arising out of that transaction. *Klamath and Moadoc Tribes et al* v. *U. S.*, 81 C. Cls. 79, affirmed by the Supreme Court, 296 U. S. 244.

Indian land claims; accuracy of Boundary Commission report; acquiescence by Indians in the report.—It is held that the remaining claims as to the alleged exclusion of an additional 805,400 acres, based on the alleged breach of the 1864 treaty by the defendant, come within the special jurisdictional act; however, the report of Boundary Commission, made in 1896, is held to have been painstaking and thorough and in substantial conformity with the understanding of the Indians as to the boundaries, and said report was not only not contested but its ratification by Congress was urged by the Indians.

Evidence.—Testimony of aged Indians as to their recollections concerning the boundaries, based on what they remember to have heard in their childhood, is held to be without probative value.

The Reporter's statement of the case:

Mr. G. Carroll Todd for the plaintiffs. *Messrs. Daniel B. Henderson, T. Hardy Todd, John Irwin* and *C. M. O'Neil* were on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

The court made special findings of fact as follows:

1. An Act of Congress, approved May 26, 1920, 41 Stat. 623, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims of whatsoever nature which the Klamath and Moadoc Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.
>
> SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands

thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit to be filed within five years after the passage of this Act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

SEC. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

SEC. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as

herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

2. In 1864 the plaintiffs held by immemorial possession a large area of land, over 20,000,000 acres, located in what are now the States of Oregon and California. H. Rep. No. 969, 57th Cong., 1st sess., p. 1. Their title was not disputed.

3. By an Act of Congress approved March 25, 1864, the President was authorized to conclude a treaty with the plaintiffs "for the purchase of the country occupied by them." 13 Stat. 37.

4. On October 14, 1864, a treaty was made and concluded between the United States and the plaintiffs whereby the latter ceded to the United States all their lands, except a certain agreed tract within the limits of the territory ceded, hereinafter referred to as the Reservation and described in the treaty as follows:

> * * * Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. * * *. 16 Stat. 707, 708.

5. In 1871 the first survey of the Reservation was made by George Mercer and was duly accepted and approved by the General Land Office of the Interior Department.

6. The Indians protested immediately and continuously thereafter that the survey did not correctly delineate the boundaries of their reservation as the same had been established by the treaty.

7. In 1877, Mr. J. H. Roork, then agent in charge, made an investigation of their claims with respect to the true location of the boundaries of their reservation and advised the Department of the Interior that the survey made in 1871 had erroneously excluded from the reservation large areas of land on all sides.

8. By letter dated July 15, 1878, William M. Leeds, Acting Commissioner of Indian Affairs, advised the Secretary of the Interior that the survey made and approved in 1871 was "flagrantly erroneous" and deprived the Indians "who thoroughly understand the topography of their reservation and its well defined natural boundaries" of large bodies of their land, and recommended "that a new survey of the outboundaries of said reservation be directed, the same to be executed in strict conformity to the provisions of said Treaty."

9. The Secretary of the Interior, while agreeing that a new survey was necessary, replied under date of September 12, 1878, that "there does not at present appear to be any public funds available for the accomplishment of this work."

10. The Report of the Commissioner of Indian Affairs for the year 1881 stated:

> It is admitted by the General Land Office that the treaty lines of the east and south and a portion of the west side of the reservation were not followed by the surveyor who made the survey of the reservation in 1871, but that certain lines of the public survey lying considerably inside of the reservation, as defined by the language of the treaty, were followed instead. Hence it would appear that the Indians have good grounds for complaint.

11. On January 11, 1887, the Commissioner of Indian Affairs advised Joseph Emory, then agent in charge of the reservation, that a new survey of the reservation was in contemplation, and instructed him to make a thorough investigation and report with respect to the true location of "the mountains west of the lake" and "Ish-tish-ea-wax Creek," which appeared then to be the principal points in dispute, and the location of "the true eastern boundary as understood at the time the treaty was concluded."

12. On June 16, 1887, Joseph Emory, after investigation, reported that the testimony of the Whites and the Indians was conflicting as to the true location of the eastern boundary, but that from personal observation and the sworn testimony of the Indians he thought the Indians were correct. He therefore recommended that if a resurvey be determined upon the eastern boundary be run according to the Indians' claim. He also recommended that the northern line be run about two miles north of the line shown on the Mercer survey and that the southern line follow the well defined range to the Point of Rocks.

13. Upon receipt of this report, in view of the vague and indefinite description of the boundaries given in the treaty, and the fact that settlement had been made upon the lands east of the reservation, it was determined to reestablish the eastern boundary in accordance with the survey made in 1871, although the claim of the Indians seemed to be well substantiated.

14. A resurvey was accordingly made in 1888, by William Thiel, United States deputy surveyor, reestablishing the lines of the admittedly erroneous Mercer survey of 1871 with minor changes on the north and south boundaries and was accepted by the General Land Office of the Interior Department.

15. The Indians continued to complain that neither of the surveys conformed to the boundaries of the Reservation as agreed upon, but nothing was done to correct the matter until the President, under authority of the Act of Congress approved June 10, 1896, 29 Stat. 321, appointed a Boundary Commission to investigate and determine as to the correct

location of the boundaries of the Reservation according to the terms of the treaty.

16. On December 18, 1896, the Boundary Commission made a report in which it found that 617,490 acres had been erroneously excluded from the Klamath Reservation by the previous surveys of 1871 and 1888 and determined the correct boundary line of the Reservation to be as follows:

> Beginning upon the eastern shore of the middle Klamath Lake at the Point of Rocks, about 12 miles below the mouth of Williamsons River; thence following up said easterly shore to the mouth of Wood River; thence up Wood River to a point 1 mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge northwesterly to Mount Scott (Tum sum ne); thence continuing on the same ridge to Cowhorn Mountain or Mount Theilson (His-chok-wal-as); thence duly east passing north of the upper lake to Mount Francis (Chok chok lisk se) to the summit of the mountains on the east side of the lake; thence following said mountain southeast to its junction with Winter Ridge; thence south along said ridge to Gerhart Mountain (Wal lok sik klos); thence southwest along a spur of Winter Ridge to the point where Sprague River is intersected by the Ish-tish-e-wax Creek; thence in a southwesterly direction to We-leej; thence northwest to the 118 mile post of the present boundary line and along the summit of the mountains, the extremity of which forms the Point of Rocks, the place of beginning, as shown by the solid red line on map accompanying this report and marked Exhibit B. [Sen. Doc. 93, 54th Cong., 2d sess., pp. 7–8.]

17. In 1900 a survey was made by William C. Elliott, United States Deputy Surveyor, showing the boundaries fixed by the Boundary Commission, as a result of which it appeared that the land erroneously excluded amounted to 621,824 acres instead of 617,490, as estimated by the Boundary Commission.

18. On June 17, 1901, an agreement was made between the Indians and the United States, through Inspector James McLaughlin (34 Stat. 325, 367), as follows:

> ARTICLE I. The said Klamath and other Indians belonging to the Klamath Agency, Oregon, for the consideration hereinafter named, do hereby cede, surrender,

grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four, and proclaimed February seventeenth, eighteen hundred and seventy, as confirmed by the Klamath boundary commission in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six, and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one, the United States stipulates and agrees to pay to and expend for said Indians, in the manner hereinafter provided, the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents ($537,007.20), being at the rate of eighty-six and 36/100 (.86 36/100) cents per acre, the price awarded for said lands by the Klamath boundary commissioners in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six.

19. Congress duly appropriated the sum of $537,007.20 for the purpose of carrying into effect the agreement set forth in the preceding finding. This sum was paid to and expended for plaintiffs in accordance with the provisions of said agreement.

20. During the interval between the negotiation of the agreement of 1901 and its approval by Congress in 1906, plaintiffs presented numerous requests and memorials urging ratification of the agreement.

21. Plaintiffs made no protest to the findings of the Boundary Commission when its report was filed, and did not challenge in any way the correctness of the boundary lines established by the Commission until many years thereafter.

The court decided that the plaintiffs were not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Under an act of Congress approved May 26, 1920, 41 Stat. 623, the court was vested with jurisdiction "to hear and determine all legal and equitable claims, if any," of the plaintiff Indians against the United States, "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due."

The present suit was brought to recover the value of lands which the plaintiff Indians are alleged to have been deprived of by erroneous surveys made by officers and agents of the United States of the boundaries of their reservation as set forth in the treaty of October 14, 1864; and to recover additional compensation for 621,824 acres of land theretofore determined by the Boundary Commission of 1896 to have been erroneously excluded from the reservation.

The United States and the plaintiff Indians entered into a treaty in 1864 (16 Stat. 707), whereby plaintiffs ceded to the United States all their right, title, and claim to all their lands. Out of the lands so ceded by the treaty the following reservation was created and set apart as a home for the Indians:

> Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of

the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning.

In 1871 the outboundaries of this reservation were surveyed by one Mercer, an employee of the General Land Office. This survey was admittedly erroneous and excluded from the reservation a large amount of land which under the treaty should have been included therein. The Indians objected to the survey claiming that it did not delineate the borders of the reservation as agreed upon and set out in the treaty of 1864. The reservation was again surveyed in 1888 by one Thiel, also an employee of the General Land Office of the Interior Department. The Thiel survey followed exactly the Mercer survey of 1871 except for slight changes in the north and south boundaries. This survey was also erroneous and excluded a large area of land from the reservation as defined in the treaty. The Indians continued to protest and thereafter the President, pursuant to an act of Congress approved June 10, 1896, 29 Stat. 321, appointed a commission consisting of three members whose duty it was to investigate and determine the boundary lines of the reservation as the same had been established by the treaty, and report its findings with respect to such boundary lines, and also to report the number of acres, if any, which had been excluded, and the value thereof. On December 18, 1896, the Commission made its report establishing the outboundaries of the reservation as defined in the treaty creating the reservation. As a result of the findings of the Boundary Commission and the ensuing survey by one Elliott, a deputy United States surveyor, it was found that 621,824 acres of land had been erroneously excluded from the Reservation by the previous surveys.

Thereafter, on June 17, 1901, an agreement was made between the United States and the plaintiff Indians, which agreement was approved by the act of June 21, 1906, 34 Stat. 325, 367, 368, whereby the Indians ceded the 621,824 acres of land to the United States for the sum of $537,-

007.20,[1] which amount was duly appropriated by Congress, deposited in the Treasury to the credit of the Indians, and disbursed by the United States for their benefit in accordance with the provisions of the agreement.

The claims asserted by plaintiffs in the petition fall into two classifications: (1) Those predicated upon the alleged failure of the defendant to pay plaintiffs the actual value or adequate compensation for the 621,824 acres of plaintiffs' reservation found by the survey, made pursuant to the report of the Boundary Commission, to have been erroneously excluded from the reservation by previous surveys, aggregating $3,184,137.80, and (2) claims predicated upon an alleged error of the Boundary Commission in failing to establish the outboundaries of the reservation according to the treaty provisions and as understood by the Indians, resulting in the exclusion therefrom of approximately an additional 805,400 acres, aggregating $4,626,411.25.

It is clear the claim falling under the first classification, viz, the alleged inadequacy of the compensation paid to plaintiffs for the cession of 621,824 acres of their land erroneously excluded from their reservation by early surveys of it by Mercer and Thiel, is without the jurisdiction of the

[1] ARTICLE I. The said Klamath and other Indians belonging to the Klamath Agency, Oregon, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four, and proclaimed February seventeenth, eighteen hundred and seventy, as confirmed by the Klamath boundary commission in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six, and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one, the United States stipulates and agrees to pay to and expend for said Indians, in the manner hereinafter provided, the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents ($537,007.20), being at the rate of eighty-six and 36/100 (.86 36/100) cents per acre, the price awarded for said lands by the Klamath boundary commissioners in their report to the Secretary of the Interior, dated December eigtheenth, eighteen hundred and ninety-six.

court unless the effect of the agreement of June 17, 1901, has been waived by the jurisdictional act. Plaintiffs contend that the jurisdictional act waives the estoppel of the agreement of 1901, approved by Congress June 21, 1906. The plaintiffs say "since the boundary controversy has existed from the date of the first survey in 1871 it is clear from the jurisdictional act that Congress intended to refer it to this court for final determination," and that "if the language of the act had left the matter in any doubt it would be dispelled by the reports of the Committees on Indian Affairs of the House of Representatives and the Senate recommending the passage of the act." The language of the report of the House committee, particularly pointed out by plaintiffs in the brief, reads:

> It appears to the Committee on Indian Affairs that the Indians mentioned in said treaty of October 14, 1864, honestly believe that they have a good and bona fide claim against the Government, and it is the opinion of the committee that they are entitled to have their day in court, and that they should be permitted to take the above claims into the Court of Claims for final adjudication.

The "above claims" referred to by the House Committee on Indian Affairs are the claims of the plaintiff Indians theretofore particularly enumerated and described by the committee in the report and as set out by plaintiffs in their petition to the Secretary of the Interior urging that Congress "enact proper legislation which will enable them to employ attorneys to properly prepare and submit these claims to the Court of Claims for final adjudication." The claim that there is a balance due plaintiffs because of the inadequacy of the compensation paid them for the cession of the 621,824 acres of land excluded from their reservation by reason of erroneous surveys was not among the "above claims" referred to by the House Committee. This claim was not presented to Congress and was not referred to by the House Committee in its report. It is not mentioned in any of the various documents considered by the committee, including the petition filed by plaintiffs in the office of the Secretary of the Interior in which plaintiffs'

claims are set forth in great detail. In fact there is not a scrap of evidence in the entire record of the case that plaintiffs at any time, prior to the date of the filing of the petition in this case, ever asserted in any manner that they had a claim against the United States because of the inadequacy of the compensation paid them under the agreement of June 17, 1901, for the cession of the 621,824 acres of land involved. What plaintiffs represented to Congress when the jurisdictional act was being considered was that they had lost 1,082,880 acres of land by reason of erroneous surveys of their reservation; that in settlement under the agreement of 1901 only 621,824 acres were ceded and paid for; that it had been represented to them at the time the agreement was signed that the Government would settle with them later for the remainder of their lands, and that this had not been done. In view of these facts which are fully disclosed in the report of the House Committee recommending the passage of the jurisdictional act it is perfectly clear that the committee did not intend that the act waive the legal effect of the settlement and release under the agreement of 1901. The Indians in their representations to Congress did not ask that the settlement and release under the agreement of 1901 be waived, the committee did not so recommend, and the jurisdictional act does not so provide either in express terms or by necessary implication.

In *Klamath and Moadoc Tribes et al.* v. *United States*, 81 C. Cls. 79, these same plaintiffs under the instant jurisdictional act sought recovery of the value of certain of their lands within the limits of this identical reservation, which through a mistake had been disposed of by the Government to other parties in 1906. Cangress in 1908 (35 Stat. 70, 92) appropriated the sum of $108,750 as payment for the lands so disposed of, payment of which sum was conditioned upon the execution by the Indians of a release of any and all claims and demands against the United States for such lands. The required release was duly executed by the Indians and the money so appropriated was paid to and accepted by them. Plaintiffs in that case, as in the instant case, made the contention that the jurisdictional act waived the defense of the

settlement and release. In deciding this contention adversely to plaintiffs the court said:

> A review of the many cases decided by this court discloses, we think, that when Congress intends to waive a defense it has left no room to doubt the intention. * * * When Congress intends, as the cases indicate, to waive the effects of settlements and awards, apt language is used to accomplish the purpose.
>
> * * * * *
>
> In this case we have not only a payment made and accepted, but a written release, comprehensive in terms, which was intended to and did extinguish any existing liability. No future claim could be based upon the transaction unless Congress waived the legal effect thereof. The issue here is not alone one of payment working an estoppel, but the setting aside of a release which admittedly closed the transaction and extinguished all liability under the claim. If Congress intended to nullify a release it would have used language clearly evidencing that intention. In the choice of legal terms we cannot assume that Congress intended to set aside a *release* by using the words "payment upon a claim." Judicial precedents, quite familiar, limit the court in construing special jurisdictional acts to "the plain letter of the law conferring jurisdiction."

The court held that the jurisdictional act did not extend to the claim and dismissed the petition. The Supreme Court affirmed the decision of the court in *Klamath and Moadoc Tribes of Indians et al.* v. *United States*, 296 U. S. 244. The court said:

> This claim is plainly not, within the meaning of § 1, for an amount due under treaty, agreement or law of Congress or for misappropriation of funds of the Indians. Plaintiffs maintain that it is covered by the clause: "for the failure of the United States to pay said Indians any money or other property due." There is here involved no question as to the adequacy of that language to cover any of the claims referred to in plaintiffs' application to the Congress; we are considering whether it extends to this claim assuming that prior to the enactment it had been effectively released. If the release stands, no money or property is due plaintiffs, for the settlement and release wiped out the claim. If the Act is sufficient to give jurisdiction of

this claim, then it permits plaintiffs to bring into the Court of Claims for determination *de novo* all claims, whether released or not, that they ever had against the United States, excepting only those already there determined. It goes without saying that, if Congress intended to grant so sweeping and unique a privilege, it would have made that purpose unmistakably plain.

* * * * *

* * * the jurisdictional Act does not extend to the claim in suit and the Court of claims rightly dismissed the case.

The decisions cited are directly in point in the instant case and must control the disposition of the claim under consideration. Plaintiffs' claim for additional compensation for the 621,824 acres of land ceded to the defendant on the ground that the payment therefor was inadequate does not come within the jurisdictional Act, the agreement of 1901 and the release executed thereunder having accomplished a complete settlement of all claims of plaintiffs arising out of that transaction.

The remaining claims involved as heretofore stated, are predicated upon the alleged error of the Boundary Commission in the establishment of the outboundaries of the reservation resulting in the exclusion therefrom of 805,400 acres in addition to the 621,824 acres ceded to the United States under the agreement of 1901. It is asserted in the petition and before the court in the argument that plaintiffs have not been compensated for the additional 805,400 acres and that it was represented to them at the time the agreement of 1901 was signed that the Government would later on settle with them for the remainder of their lands. These claims being based on the alleged breach of the treaty of 1864 by the defendant come within the terms of the jurisdictional act, the court being called upon to construe the agreement of 1901 and determine whether or not the settlement agreement and release therein is inclusive of the claim for the additional lands here asserted.

The plaintiffs contend the description of the Klamath Reservation set forth in the treaty of 1864 is indefinite, confused, and irreconcilable in some of its calls, and cannot be literally followed, and that the treaty being con-

fused and irreconcilable in some of its calls the court must construe the language so as to effectuate the intention of the parties, giving special weight to the understanding of the Indians. It is asserted that the Boundary Commission in its determination of the boundary did not correctly construe the language of the treaty, and ignored in large part the understanding of the Indians.

The reservation boundaries as claimed by the plaintiffs are shown on a map prepared for them by a surveyor named Eugene B. Henry, in the year 1923 or 1924, revised October 31, 1931. The boundaries as shown on this map are as follows:

> Beginning at the Point of Rocks, known to the Indians as Kal-wal, on the eastern shore of the upper Klamath Lake, about twelve miles below the mouth of Williamson River; thence across said lake in a westerly direction to Kom-kom-la (Little Aspen Butte); thence north along the summit of the range through Posk-nect-kas (Aspen Butte), Mon-gin-na (Pelican Butte) and Jon-doles (Klamath Point); thence following the range around the south side of Gay-was (Crater Lake), to Tum-sum-ne (Mt. Scott); thence north along the range to His-chok-wal-as (Mt. Thielson); thence north to Ba-la-wisk-se; thence easterly to Tsne-wheel-sto-e-los (Walker Mountain); thence easterly to Ba-ha (Bald Mountain); thence southeasterly to Chok-chok-lisk-se (Hager Mountain); thence easterly to Bal-bal-is-ki or Yin-a-del-wis (Dead Indian Mountain), the northern end of Winter Ridge; thence in a southerly direction along the summit of Winter Ridge to Wol-lock-se-klos (Gearhart Mountain); thence east and south along the ridge east of the headwaters of the streams flowing into Sprague River to the headwaters of Ish-tish-ea-wax Creek at Eo-lum-na; thence westerly to We-leej (Horse Fly Mountain); thence southwesterly to No-sult-ga-ga (Bonanza); thence in a westerly direction to Mo-yunt (Moyina Hill); thence westerly to Da-plum-ini (Plum Hills), the southern end of the mountain the extremity of which forms the Point of Rocks (Kal-wal); thence along said mountain through a high plateau or flat called Mbok-wals to the Point of Rocks (Kal-wal), the place of beginning.

The various points in the boundary lines as shown by Henry on his map were fixed on the basis of information

furnished him by the Indians as to what the Indians understood the boundaries of the reservation were at the time it was created in 1864. Plaintiffs have sought to show by the oral testimony of many witnesses that the boundary lines shown on the Henry map were the boundary lines as they were understood by the Indians. These witnesses, in the main aged members of the tribe, testify as to what they were told in their youth in respect to the reservation boundaries. Typical of the testimony of these witnesses is that of Yank Lobert:

Question. Mr. Lobert, you say you are 76 years old; and the treaty was made in 1864. That would make you about 10 or 11 years old at the time of the treaty. Is that right?

Answer. That's it. Yes.

Question. Do you remember the council at which the treaty was made?

Answer. Yes.

Question. Were you present at the time—were you present in council where the treaty was being made?

Answer. Yes.

Question. State whether or not you were told after the treaty was made that a reservation was or had been set apart for the Indians.

Answer. I heard about it.

Question. Do you know where the reservation lines were fixed?

Answer. Yes; not all; one side and some more.

Question. Can you state where the lines are that you know?

Answer. I knew a few mountains; that is all.

Question. From whom did you learn where the boundary line was; who told you the boundary line?

Answer. Some of our chiefs—La Lakes.

The witness in answer to leading questions propounded by plaintiffs' counsel identified several points as being on or within the boundary lines of the reservation, notwithstanding the fact that he made such identification on information imparted to him more than sixty years before that time. Manifestly, this character of testimony is

largely, if not entirely, without probative value. We have examined with care the oral testimony of plaintiffs' witnesses in respect to the understanding of the Indians as to the boundaries of the reservation at the time it was created, and, without further detailed consideration of that testimony here, we are clearly of the opinion that it falls far short of establishing that the Indians at the time of the treaty understood the boundaries of the reservation to be those shown on the Henry map.

Moreover, we think the record justifies the conclusion that the boundary lines of the reservation fixed by the Boundary Commission were in substantial conformity to the understanding of the Indians as to such boundaries. It is clear from the report of the Commission that the understanding of the Indians as to the boundary was given careful consideration, and not ignored in large part as contended by plaintiffs. The Commission upon its arrival at the reservation met all the surviving Indian signers of the treaty living in the vicinity of the Klamath Agency and procured sworn statements from them. It then proceeded to explore the entire territory in dispute. Accompanied by a guide delegated by the Indians to point out the various locations under their Indian names the Commission then spent six weeks traveling by wagon, horseback, and afoot, visiting all the disputed points. There can be no doubt from the report of the Commission that its investigation of all controversies growing out of the previous erroneous surveys was painstaking and thorough. The Indians made no protest to the report of the Boundary Commission when it was filed, which they undoubtedly would have done had the boundary lines established by it been unsatisfactory to them. The long continued and ever increasing complaints of the Indians in respect to the boundary lines of the reservation as fixed by the surveys of 1871 and 1888 ceased immediately upon the filing of the report of the Boundary Commission. The agreement of 1901 was not approved by Congress until 1906. During the interval between the execution of the agreement and its ratification by Congress numerous requests and memorials were presented by the Indians urg-

ing the ratification of the agreement and no claim was made at any time that the Boundary Commission had failed to establish the boundaries of the reservation as set forth in the treaty and as understood by the Indians. The conclusion is inescapable that the reservation boundary lines established by the Boundary Commission were entirely acceptable to plaintiffs and in conformity with their understanding of the boundaries as provided by the treaty. The conclusion is equally manifest that the Indians regarded the agreement of 1901 and the release executed thereunder as a final and complete settlement of all their claims and demands against the defendant growing out of the controversies in respect to the boundaries of their reservation. The proof does not sustain the contention of plaintiffs that the reservation boundary lines established by the Boundary Commission were erroneous.

Plaintiffs are not entitled to recover and an order will be entered dismissing the petition.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHN SCHMOLL, ASSIGNEE FOR THE BENEFIT OF CREDITORS OF MURCH BROTHERS CONSTRUCTION COMPANY, INC. v. THE UNITED STATES

[No. 42519-A. Decided April 4, 1938]

On the Proofs

Contract for construction of barracks buildings; lumber for shelving.—Provisions of contract must be interpreted in the light of a contractor's experience, where specifications are not explicit.

Same; extra work.—Where specifications called for safety treads only on all interior concrete stairs, it is held that stairs between porches attached to the building were not interior stairs and contractor is entitled to recover for safety treads thereon as extra work, $406.80.

Reporter's Statement of the Case

Same; punctuation.—Conflicts in specifications with respect to an item obviously an essential element of the contract work are not to be determined in all instances upon the question of punctuation.

Same; conflict in testimony.—Where contract gave defendant no express authority to require plaintiff to deliver extra steel, and a conflict in testimony does not support defendant's contention as to delivery by plaintiff of surplus steel, it is held plaintiff is entitled to recover, $1,750.

Same; acceptance of change order.—Where change order covered the debits and credits arising from its issue, and was accepted by plaintiff, there can be no recovery.

Same; extra work.—Where plans called for expansion joints only "in interior and porch floors," and contractor was required to place expansion joints elsewhere, this was extra work and plaintiff is entitled to recover, $2,186.90.

Same; items allowed.—Government concedes as due two items, $8.95 and $71.28.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Murch Brothers Construction Company, Inc., a corporation organized under the laws of the State of Missouri, with its principal office in St. Louis, Missouri, filed the original petition herein on September 30, 1933. It is docketed as No. 42519. That petition was based on two distinct contracts, one with the United States War Department and one with the United States Veterans' Bureau. On December 17, 1935, the court ordered plaintiff to separately state its two causes of action.

2. On January 3, 1936, pursuant to chapter 36, Revised Statutes of Missouri for 1929, plaintiff assigned all its property to John Schmoll, as trustee for the benefit of its creditors. On July 31, 1936, the court substituted John Schmoll as such trustee for the original plaintiff herein. On September 25, 1936, John Schmoll, as such assignee, filed his petition herein, No. 42519-A. His petition is based on this contract with the United States War Department.

3. On October 19, 1929, the United States, represented by L. H. Bash, Brigadier General, Q. M. Corps, Chief, Construction Service, as contracting officer, and the Murch Brothers Construction Company, as contractor, entered into a contract whereby the contractor, in consideration of the sum of $1,223,000, agreed to furnish all labor and material and perform all work required for the construction and completion of one Air Corps warehouse; one Quartermaster warehouse; and six Air Corps barracks, at Randolph Field, Texas, in accordance with the contract, drawings, schedules, specifications, and addenda, which are of record as "Defendant's exhibit Randolph Field, Texas, No. 3", pages 1–219, and by reference are made part hereof.

4. Paragraph 192 of specification No. 8446–D reads:

> 192. *Shelving*.—The shelving shall be of wood as hereinbefore specified, and constructed as shown on detail drawings. The counter-shelves shall be of ash, built-up of strips 1⅛″ thick.
>
> NOTE.—Provide the following quantities of No. 1 common yellow pine or Douglas fir, dressed lumber for knock-down shelving, including necessary nails complete for storerooms in basement. This shelving is not to be erected under this contract.

Boards, 1″ x variable widths	2, 700 B. M.
Posts and rails, 2″ x 4″, variable lengths	1, 700 B. M.
Rails, 1″ x 4″	500 B. M.

The contractor began its work on a 300-man barracks, which was the first building completed. In October 1930 the contractor by letter asked the constructing quartermaster for the dimensions of the lumber to be furnished, as required by paragraph 192. The contractor placed in said 300-man barracks the required 4,900 feet of lumber, according to the dimensions and directions furnished by the constructing quartermaster, following which the contractor contended that it had furnished all the lumber called for by the contract, and that the contractor was not required to furnish 4,900 feet board measure for each of the remaining five barracks buildings. The plans do not show this shelving in the other five buildings. Four thousand nine hundred feet board measure of lumber for knock-

down shelving were sufficient only to meet the requirements for shelving in one of the six barracks buildings.

On December 22, 1930, the contractor by letter protested to the constructing quartermaster against said ruling, stating that it expected to be paid for any additional lumber furnished above the amount stipulated in the specifications. The constructing quartermaster forwarded plaintiff's letter of protest to the Quartermaster General, who agreed with the interpretation placed upon paragraph 192 by the constructing quartermaster, requiring the contractor to deliver 4,900 feet board measure of lumber, for knock-down shelving, for each of the six barracks. The contractor delivered 4,900 feet board measure of lumber, of variable lengths and widths, for each of the said six barrack buildings and $765.35 is a fair and reasonable value for the lumber so furnished by plaintiff for the remaining five barrack buildings.

5. Paragraph 99 of specifications 8446–D reads:

> 99. *Concrete Stairs and Steps.*—All concrete stairs and steps shall be of Type "B" concrete, reinforced as shown. The rails, etc., shall be accurately set in forms before pouring concrete. The Contractor shall furnish and set approved nonslip iron or steel nosings at all treads and platforms, they shall be approximately 3½″ wide and shall extend to within 6″ of either end of tread and be securely anchored to the concrete. Stairs supported by deep footing columns and cantilever brackets shall be constructed as shown on drawings.

A "note" on drawing 621–317, plaintiff's exhibit 1, reads:

> Safety treads to be used on all interior concrete stairs; to be approximately 3½ inches wide and to extend to within 6 inches of either end of treads.

The constructing quartermaster interpreted paragraph 99 to require the contractor to furnish safety treads on all interior and exterior steps, with the exception of the main front and rear portal steps. The drawings did not disclose which stairs were to have safety treads. The contractor contended it was required to furnish them only for interior steps. The resulting dispute was submitted to the Quarter-

master General who, on March 17, 1930, wrote the contractor:

Acknowledging your letter of February 24, 1930, reference safety treads on interior and exterior stairs of the barracks, this matter has been referred to Washington and it is their opinion that exterior stairs or steps do not require safety treads.

Their ruling is as follows: "That safety treads be provided on all interior stairs and steps, and including the stairs between porches. The latter are under cover and are essential. Safety treads will not be required on the main front and rear portal steps, steps from kitchen porches to grade, outside areaway steps, and steps to garbage can racks."

Our letter of February 19, 1930, directed that you place treads on certain exterior steps. This has entailed certain expenses which you are requested to itemize and bill us immediately.

On March 14, 1930, the Quartermaster General had ruled "That safety treads be provided on all interior stairs and steps, including the stairs between porches. The latter are under cover and are essential." The contractor furnished safety treads for all interior stairs, including the stairs between porches. The porches of the barracks were 12 feet wide, and the porch stairs leading from the first to the second floor were located about one foot from the outer edge of the porches. The sides were open. The buildings were two stories high. The roof over the second floor of the porch protected these stairways in part from the wind and rain. Plaintiff installed these treads on the porch stairs, under protest, at a cost of $406.80.

Plaintiff also placed safety treads on the exterior steps of building No. 4, at a cost of $8.95, for which it has received no payment. This was done before the Quartermaster General decided that safety treads were not required on outside steps.

6. Paragraph H-37 of specifications 8446-D reads:

H-37. *Painting.*—Before covering is applied all pipe castings, sheet iron, etc., shall be thoroughly cleaned and painted with two heavy coats of the best quality black graphite paint as approved by the C. Q. M.

> All iron work such as hangers, pipe supports, etc., shall be thoroughly cleaned of all scale and given one coat of the best quality black asphaltum varnish.
>
> Painting of all radiators and exposed pipe is covered in another section of the specification.
>
> All pipe, boiler and expansion tank covering shall be painted 3 coats of lead and oil in a lead color tint as selected by the C. Q. M. All equipment that is not covered, such as pumps, motors, etc., shall be rubbed down and given one flat coat of color before leaving the factory. After installation, same shall be given another coat of color as selected by the C. Q. M., and two coats of the best varnish.
>
> Breechings shall be painted inside and out with one coat of red lead and two coats of the best quality graphite paint.

A controversy arose as to the proper interpretation of the first sentence of par. H-37. The contractor contended that it was not required to paint heating pipes, before applying the covering, and that such painting must be considered as an extra. The Government contended that through a typographical error a comma had been omitted between the words "pipe" and "castings"; and that it should read "pipe, castings", rather than "pipe castings". Plaintiff contended it should not be penalized because of such typographical error.

On August 27, 1930, the constructing quartermaster advised the contractor by letter that he interpreted this paragraph of the specifications as requiring the contractor to paint all pipes with graphite before covering was applied, in accordance with the general practice; and that there was no such trade term as "pipe castings."

Plaintiff protested this decision, and asked for an appeal to the Quartermaster General, which was duly taken. The Quartermaster General held:

> The fact that the specifications require the heating pipes to be painted cannot be questioned, even if the first sub-paragraph of paragraph H-37 is disregarded, as the painting is called for elsewhere in the specifications. The contractor's attention will be invited to paragraph 233 and to sub-paragraph 4 of paragraph H-37.

The first sentence of paragraph H-8 of the specifications 8445-D reads:

> H-8. *Painting*.—All pipes, fittings, etc., shall be painted with two heavy coats of black graphite paint of the best quality, approved by the C. Q. M.

In reply, the contractor cited the language from paragraph 233 of sub-paragraph 4, covering interior painting, wherein it states "There shall be no painting in basement except on wood and metal work."

On September 30, 1930, the contractor advised the constructing quartermaster that it was proceeding with the work under protest. It is agreed that a fair value for the labor and material so furnished in painting the plumbing pipes in the basement of said buildings is $792.

7. The first sentence of paragraph 34 of Specifications 8446-D reads:

> 34. *Excavation Generally*.—Do all excavating of every description and of whatever substances encountered, to the dimensions and levels shown on drawings for all footings, foundations, floors, areas, walks, etc.

Paragraph 35 of specifications 8446-D reads:

> 35. Excavations for footings of all descriptions shall be carried down to the depths and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M. Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S., as per amount mentioned for excavating under "Unit Prices" of bid.

Drawing No. 761 is a drawing of the 250-man barracks, showing two elevation levels—one deep and one shallow. The specifications call attention to those different depths of footings, designating two of the buildings above shallow footings and four of the buildings above deep footings. The specifications required the contractor to visit the site and familiarize itself with conditions. This it did, and concluded that the elevations as shown on said drawings were correct. The specifications did not state that the contractor

would be expected to raise the footings higher than shown on the drawings. The contractor relied on the test pits dug by the Government, and ordered all the reinforcing steel according to the lengths shown for the basement footings and columns. After the contractor had placed its order for the steel, the quartermaster advised that it would be unnecessary to go down to the specified depths and ordered them raised. In complying with this order the contractor was forced to cut off the already ordered steel to fit the new depths. Under protest this cut-off steel was later turned over to the Government. The Government contended this steel belonged to it. This change was accomplished by defendant's change order "B" dated September 25, 1930. The labor cost of cutting this steel to meet the Government's orders amounted to $750.

On July 24, 1930, the constructing quartermaster wrote Murch Brothers Construction Company as follows:

> Reference the foundation additions and deductions on the six barracks buildings there is attached hereto our computation of the credits and debits for the barracks buildings under your contract.
>
> There is a total net credit due the United States of $5,006.54 of which you will furnish us 30.95 tons of reinforcing steel at $90.00 per ton, which is the unit price, leaving a net deduction against your contract of $2,221.04.
>
> You will be instructed at a later date when and where to deliver this reinforcing steel.

The Government received the 30.95 tons of steel, that being the amount so cut off, taking possession of it at the site. Later, the Government contended that only 5.95 tons of this steel were useful, and required the contractor to furnish 25 tons of additional steel. Under protest, the contractor furnished this additional steel, under verbal instructions from the Government, to Sumner Sollit Co., at Randolph Field, at an expense to the contractor of $1,750. This was the actual cost of the steel to the contractor, and it has not been paid therefor.

At the final settlement, the contractor made no formal claim for this item of reinforcing steel. On March 30, 1931,

the contractor addressed a letter to the Comptroller General which contained the following statement:

> The Government took credit from us for omission of reinforcing steel due to the footings not going down to the depth shown on the contract drawings and we therefore believe we were unjustly penalized and ask that you review this case and allow us the $1,750 that the Government deducted from our contract in Change Order (B) Decrease dated September 25, 1930, which is included in the total sum of $2,221.04 under Item 2.

8. Paragraphs 82 and 83 of Specifications 8446–D read:

> 82. *Joints—General.*—Joints not indicated on the plans shall be so designed and located as to least impair the strength and appearance of the structure. To prevent laitance in horizontal joints, excess water shall be removed from the surface forming the joint after depositing the concrete. Surfaces of contact shall be cleaned and wetted before depositing is resumed, and any laitance shall be removed.
>
> 83. *Construction Joints.*—Construction joints shall be provided where called for in these specifications or where shown on drawings. The term "Construction Joint" shall apply only to the pouring of the concrete, and the steel reinforcement shall extend through as though no joint existed.

On September 23, 1929, paragraph 82 was modified by "addenda" to specifications, reading:

> XXXII. *Spec. 8445 D Par. 73 and Spec. 8446–D Par. 82.*—Delete these paragraphs and substitute the following:
>
> Furnish and build in where shown on drawings, sheets of 16 U. S. gauge copper for expansion joints. Joints shall be filled with asphalt mastic which will permit of expansion and contraction and at the same time remain perfectly waterproof.
>
> All expansion joints to have slip joint steel plates on floor, which will permit of expansion and contraction.

The function of an expansion joint in a building or other structure is to protect it from rupture, due to expansion or contraction because of temperature changes. The movable parts of the joint are separated into spaces of varying dimensions. These open spaces must be filled with materials possessing elasticity to serve as an effective insulation

against heat and cold, and to protect the interior of the structure from exposure to the elements. Asphalt, copper, and other mastic compounds serve these purposes.

The contractor early called to the attention of the constructing engineer that the floor plans called for expansion joints only at the floor; that the buildings were to be constructed in three different parts so that there would be expansion joints in two places, which would permit the three different parts of the building to expand and contract, but that certain columns and footings were shown on the plans as solid, which would prevent expansion and contraction. The constructing engineer communicated with the department, which advised that construction joints would have to be placed in these columns, footings, and walls, but that the Government would only pay the contractor for the reinforcing steel that would be installed. The constructing quartermaster also advised the contractor that it would have to furnish expansion material and copper strips for the construction joints.

In the upper lefthand corner of contract drawing, sheet 621–320, appears "Typical detail through expansion joint," and a note appears immediately under that designation which reads: "NOTE.—To be used in interior and porch floors." This detail shows the use of expansion joint material only on the interior and porch floors, no reference appearing as to its use in columns.

On November 22, 1929, the constructing quartermaster wired the Quartermaster General that foundation plan No. 621–762 indicated expansion joints throughout the entire building; that the detail of columns 83 and 87, basement, did not show double columns; that in his opinion these columns should be split, and he had prepared a detail of these columns as double columns, with expansion joints with copper sheet and elastite; that the contractor claimed it should be paid an additional sum of $750 on account of this change. The Quartermaster General replied that expansion joints were required by plan No. 621–762, shown in detail by plan No. 621–760, and that no extra charge would be allowed except for extra steel. The constructing quartermaster conveyed his reply to the contractor. The con-

tractor then wrote the constructing quartermaster, protesting the ruling, and stated:

> The question under discussion is whether or not the exterior basement walls are to have two separate columns with a copper strip and elastite between them, and also the exterior columns above grade to be treated in the same manner.
>
> * * * * *
>
> Defining our position more clearly as to drawing #760, this drawing plainly indicates the columns above basement to have expansion joints, but the wall below first floor level is shown with solid lines indicating no expansion joints.
>
> We are proceeding with and installing copper strips and mastic in the basement walls of the 300 Man Barracks under protest, and we would like your further consideration before proceeding with the balance of the work.

The contractor also stated in the letter that if copper strips were required, and no mastic on the exterior porch columns from the first floor up, its price would be $471 for the six barracks buildings; that if copper expansion joints with mastic were required in the basement walls below the first floor level, it would expect an additional sum of $1,100 or a total of $1,571, not including charges for additional steel.

The constructing quartermaster again referred the matter to the Quartermaster General. He stated in his letter that there was some question as to the depth of the expansion joint; that the contractor contended that no joint was indicated below the first floor line; that his office had separated these columns similar to the interior columns, and had required that exterior vertical joints from grade beams under basement floor on exterior walls (but not on porch expansion joint) should be closed with copper and mastic joint closure. The contractor admitted that it was required to place expansion joints where shown and detailed on the plans, but claimed that it was not required to fill any expansion joints with copper or asphalt mastic, except "in interior and porch floors," as shown in the upper lefthand corner of plan No. 621-320.

The contractor, in its first petition, claimed the sum of $1,667.90 on account of expansion joints, that amount being also claimed by it in its letter of March 30, 1931, to the Comptroller General. The contractor, in its amended petition, filed June 21, 1934, increased the amount of this claim to $2,186.90, which is the amount now claimed in plaintiff's petition filed September 25, 1936. This amount of $2,186.90 is composed of the following items:

For the expense of installing certain copper strips in columns B, from first floor to roof $386.40, plus 20%, overhead and profit, or a total of	$463.68
For splitting columns A and applying expansion joint material from the first floor to the footings	1,204.22
Expense for additional form work in splitting columns A from first floor to the roof	519.00
Total	2,186.90

The contractor has due it the sum of $71.28 on account of "additional steel," for which defendant agreed to make payment and which has not been paid.

9. On December 3, 1930, the two warehouses were completed, and on January 27, 1931, the six barracks were completed. On January 27, 1931, a statement was signed by the contractor's superintendent and by the constructing quartermaster, to the effect that work had been performed and material furnished in accordance with the contract. The sixteenth and final payment certified there was due the contractor $62,414.44, which sum was paid to the contractor on January 30, 1931.

No specific claim was made by the contractor to the War Department at the time of the final payment, although the contractor did file its claim with the General Accounting Office. During the performance of the contract, as the several items in controversy arose, the contractor protested to Captain Parker, the constructing quartermaster on the site. When Captain Parker overruled the contractor in the protests, plaintiff verbally requested him to appeal the matter to his superiors, which he did. Later plaintiff was advised by Captain Parker that the appeals had been denied. The first time this claim as a whole was made the subject of a written communication between the contractor and any Government official was when the contractor first submitted

its claim to the General Accounting Office. Plaintiff was given instructions in writing for each of the changes herein considered, and plaintiff installed the materials under protest.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is an assignee for creditors of the Murch Brothers Construction Company, a Missouri corporation, which entered into and performed a contract involved in this suit. No issue is raised as to the formality of the contract. The decision turns upon the construction of certain articles of the same and the specifications for the work to be performed thereunder.

The contract obligated the contractor to furnish all labor and materials, and perform all work required to erect six buildings known as Air Corps Barracks at Randolph Field, Texas. The consideration was $1,223,000, which has been paid. The items in this suit are for extra work. Five of the buildings were designed to house two hundred and fifty men, the remaining one to accommodate three hundred men.

The five so-called "two hundred and fifty man barracks" were alike in design and construction. The "three hundred man barracks" was substantially the same except as to capacity. A single set of specifications identified as #8446–D covered the descriptive details relating to all the buildings.

Paragraph 192 of specifications 8446–D contained the following provision as to shelving:

> 192. *Shelving.*—The shelving shall be of wood as hereinbefore specified, and constructed as shown on detail drawings. The countershelves shall be of ash, built-up of strips 1⅛" thick.
>
> NOTE.—Provide the following quantities of No. 1 common yellow pine or Douglas fir, dressed lumber for knock-down shelving, including necessary nails complete for storerooms in basement. This shelving is not to be erected under this contract.

Boards, 1" x variable widths	2,700 B. M.
Posts and rails, 2" x 4", variable lengths	1,700 B. M.
Rails, 1" x 4"	500 B. M.

The contractor began work on "the three hundred man" barracks and during the course of construction asked the Constructing Quartermaster to furnish him with the dimensions and quantity of lumber to be furnished under the quoted specification #192.

The Constructing Quartermaster, acting under the belief that the contractor's request concerned only the three hundred-man barracks, stated the quantity as 4,900 feet board measure. Subsequently the contractor was required by the Constructing Quartermaster to furnish for each of the remaining five buildings the same quantity of shelving lumber. The contractor protested, but did furnish the 24,500 feet exacted and for this the sum of $765.35 is asked. The Quartermaster General approved the action of the Constructing Quartermaster.

Specification #192 is not as specific as it could have been made and the plans for the five "250-man barracks" do not show this quantity of shelving to be placed therein. The specification distinctly points out that shelving is required for the storerooms in basement. Each building was provided with storerooms, and it is apparent that the Constructing Quartermaster was not intending to provide for all the buildings when he gave the estimate. The plaintiff must have known this, for as an experienced contractor he would have known that the 4,900 feet of lumber were wholly inadequate for all the buildings.

To allow recovery for this item the court would have to ignore the following provision of the specifications:

> 19. *Drawings and Specifications Co-operative:* The drawings and specifications shall be considered as co-operative and work and material called for by one and not mentioned in the other shall be done or furnished in as faithful and thorough a manner as though fully covered by both.

This item is not allowed.

A note on drawing 621–317 reads as follows:

> Safety treads to be used on all interior concrete stairs; to be approximately 3½ inches wide and to extend to within 6 inches of either end of treads.

The contractor contends that under this specification he was required to and did perform work additional to the requirement of the contract and specifications. The sum claimed is $406.80. An item of $8.95 for placing safety treads on the exterior steps of the buildings is conceded to be due the contractor.

The issue as to the above item seemingly centers upon whether the stairs between porches attached to the buildings were or were not interior stairs. From the standpoint of fact the stairs involved were not interior ones. The Quartermaster General predicated his ruling that they were interior ones upon the fact that the stairs were partly under *cover*. The same official allowed an extra payment for placing treads on certain exterior steps, not in any substantial particular different from porch stairs.

The record sustains the findings that the porches were outside the main buildings and were not inclosed. The defendant relies upon a technical definition of the word "interior", and, in addition, cites the adverse ruling of the Quartermaster General. The ruling of the Quartermaster General is not supported in fact or by the terms of the contract. The item falls under the decision of this court in the case of *M. A. Long Company* v. *United States*, 79 C. Cls. 656. Plaintiff is entitled to judgment for this additional work of $406.80.

Specification H–37 is as follows:

> H–37. *Painting*.—Before covering is applied, all pipe castings, sheet iron, etc., shall be thoroughly cleaned and painted with two heavy coats of the best quality black graphite paint as approved by the C. Q. M.

The above specification contained additional provisions for painting other finished portions of the contract work. They have no connection with paragraph H–37. Plaintiff contends that the absence of a comma after the word "pipe" simply obligated the contractor to paint "pipe castings" and not pipes. Conflicts appearing in contract specifications with respect to an item obviously an essential element of the contract work are not to be determined in all in-

stances upon the question of punctuation. *Ewing* v. *Burnet*, 11 Pet. 41.

The piping involved is heating pipes in connection with the heating plants. It was to be covered by asbestos. It is inconceivable that the contractor was misled by the above specifications, and manifestly he must contend for an extremely technical construction of the specifications to sustain the argument. In addition to the fact that the record discloses that no such trade term as "pipe castings" exists, paragraph 233 and subparagraph 4 of H-37 required this painting. The item will not be allowed.

The Commissioner of this court in Finding 7 details the facts with reference to what we may term the steel item. The defendant did not and does not now except to the finding as reported to the court. It is conceded that the extra steel used because of the change order "B" of September 25, 1930, due exclusively to defendant's change in the elevation of the excavations for the footings of the buildings involved, amounting to 30.95 tons, was paid for by the defendant.

The plaintiff insists, however, that in addition to the 30.95 tons of steel taken over by the defendant and paid for, it was compelled to and did furnish the defendant with 25 tons additional because the defendant contended that only 5.95 tons of the 30.95 tons delivered were suitable for Government purposes, the additional 25 tons being delivered under defendant's order to another Government contractor.

The defendant challenges the correctness of plaintiff's contention and asserts that the 25 tons of steel delivered to the other Government contractor were part of the 30.95 tons theretofore paid for by the defendant. The findings do not support the defense interposed. It was the defendant's change order "B" which compelled the plaintiff to reduce by cutting the lengths of the steel called for by the plans and resulted in the surplus steel involved. It is not denied that this surplus steel was delivered to the Government officials and it is impossible to reconcile a conflict in the testimony upon any other basis than the fact that there were available to the Government proper rec-

ords to prove precisely what steel was furnished by the plaintiff to the other Government contractor, when it was furnished and who paid for it.

The fact that only a small tonnage of the steel delivered to the defendant proved useful warrants an inference that the remaining nonusable steel would hardly be furnished to another contractor and delivered to it at the same place and on the same premises when the plaintiff was performing its contract. The defendant derived no express authority from the contract involved to require the plaintiff to deliver the extra steel, and none may be implied. Recovery under this item is allowable under the following cases: *Weller Construction Co.* v. *United States*, 61 C. Cls. 261; *Gearing* v. *United States*, 48 C. Cls. 12. Included in the judgment will be the sum of $1,750, the actual cost of this steel to the plaintiff.

In connection with the foregoing, plaintiff seeks to recover the sum of $750, the labor cost of cutting to its proper lengths the steel above mentioned, in accord with change order "B." We think the settlement of the parties embraced in change order "B" covered the transaction in its entirety so far as the 30.95 tons of steel are concerned (Finding 7). The change order covered the credits and debits arising from its issue, and the parties accepted it.

The final item in suit relates to expansion joint material (Finding 8). The facts with relation to this item warrant the award of judgment for the amount claimed. Expansion joints were provided for in the plans "in interior and porch floors" and nowhere else. To exact their placement as was done, i. e., requiring the contractor to place in the exterior basement walls two separate columns and expansion joints between them, was work outside the contract and specifications.

The Quartermaster General allowed the contractor $71.28 for the additional reinforcing steel which this additional work required, but refused to allow any further sum for the expansion joints. It is difficult to reconcile the two rulings, and to so rule we think was a serious error. In addition to this, the Constructing Quartermaster did not

pass upon this controversy; he referred it to the Quartermaster General and it was the latter official who determined it in the first and last instances. The contractor was entitled to a ruling from the Constructing Quartermaster under the contract. The item amounting to $2,186.90 is allowable under the following precedents, and will be included in the judgment: *Levering & Garrigues* v. *United States*, 73 C. Cls. 508; *United States* v. *Spearin*, 248 U. S. 132; *Whitlock Coil Pipe Co.* v. *United States*, 72 C. Cls. 473; *Long Company* v. *United States*, *supra*.

Judgment in the total amount of $4,423.93 will be awarded the plaintiff. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

ROBERT V. MORSE v. THE UNITED STATES

[No. 43055. Decided April 4, 1938]

On the Proofs

Validity of patent; method of dropping bomb from airplane.—The claim of the plaintiff that novelty resides in pointing downward an airplane in flight directly at the target and releasing the bomb when approximately over it, thereby increasing the initial velocity of the bomb, and obtaining accuracy of aim, did not develop a new scientific fact nor produce a new and novel method not within the knowledge of those skilled in the art.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. Titian W. Johnson, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. C. Hugh Duffy* was on the brief.

The court made special findings of fact as follows:

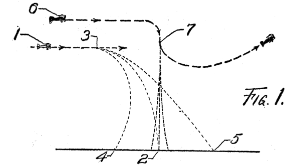
1. This suit is brought by Robert V. Morse, a citizen of the United States and a resident of Ithaca, New York, for alleged infringement of United States Letters Patent to him

No. 1374314, granted April 12, 1921, on an application filed January 4, 1918, for improvements in "Bomb Dropping System." A certified copy of the Patent Office file wrapper and contents of the patent in suit is in evidence as defendant's exhibit 24 and is made a part of these findings by reference. All other exhibits mentioned in these findings are made a part hereof by reference.

2. Plaintiff at the time of filing his petition herein was, and still is, the owner of the entire right, title, and interest in and to the patent in suit, and to all rights of recovery thereunder.

3. The patent in suit relates to a method of bombing by the use of an airplane. In bombing by airplane, as is well known, the bombs are carried by the craft and released while the craft is in the air in the neighborhood of the objective. In such bombing, two problems are involved, (1) accuracy, i. e., so releasing the bomb that it will strike the target, and (2) safety of the bombing airplane from anti-aircraft fire.

The patent in suit discloses a method of bombing shown diagrammatically in Fig. 1, reproduced herewith,



in which the pilot flies to a point substantially over the target, then puts the machine into a substantially vertical dive downward directly at the target, and releases the bomb while in the course of such dive, whereby the bomb is hurled down-

ward at the target with a high initial velocity. After the bomb is released the craft is recovered into normal flight. In such method, the only aiming required is the aiming of the airplane at the target during the dive.

4. The claims in suit are two in number and are as follows:

> 1. The method of dropping bombs from aircraft, which consists in pointing the aircraft downward when substantially over the target and in dropping a bomb while the aircraft is diving rapidly downward, whereby the bomb is dropped with a high initial velocity component downward and a comparatively small velocity component in a horizontal direction.
>
> 2. The improvement in the art of dropping bombs from aircraft which consists in carrying a bomb attached to an aircraft until it is substantially over a target, then causing the aircraft to dive substantially vertically toward the target, and then detaching the bomb while the aircraft is pointed at the target, whereby the horizontal component of the bomb trajectory is substantially eliminated and the bomb is hurled with a high initial vertical velocity toward the target.

5. Prior to the hearings in this suit the parties, through their counsel, entered into a stipulation, which stipulation reads as follows:

> It is hereby stipulated and agreed by and between counsel for the respective parties, subject to the approval of the Court of Claims, that the United States Navy, subsequent to April 12, 1921, had in its possession and used dive bombing airplanes, and practiced dive bombing in which the bomb is released at the end of the dive, and when the axis of the airplane which would approximate to its direction of motion, is pointed at the desired objective, which practice constitutes the method of dive bombing described in the patent in suit and shown in Figure 1 of the drawings, except that in the practice of dive bombing, the United States Navy does not employ any mechanical or explosive propellant for the bomb as described in the patent and shown in Figures 2 and 3 of the patent drawings.

6. In accordance with the stipulation defendant entered no defense of noninfringement, but rested upon the sole defense of invalidity of the patent, predicated upon the as-

sertion that the method of bombing carried out by the defendant involved no patentable departure from the prior art.

7. When a bomb is dropped from an airplane in horizontal flight the bomb does not drop straight downward, but on the contrary falls in the direction of movement of the airplane in what approximates a parabolic trajectory, and may be caused to drift during its descent, by wind or other causes. In general, the greater the speed of the airplane and the greater its height at the moment of releasing the bomb, the greater will be the displacement of the bomb from the target, or, stated differently, if the bomb were released at the exact instant when the airplane is over the target and flying in horizontal flight, then the faster the flight of the plane and the greater its altitude at its moment of release, the farther from the target in the direction of the airplane flight the bomb would strike. This is because the bomb, during its fall has a horizontal velocity, or component of velocity, approximating that of the horizontal velocity of the airplane at the instant the bomb is released. This requires that a correction be introduced, by releasing the bomb some time before the plane is over the target. The proper point for release of the bomb is ordinarily determined by what is called a bomb sight, comprising mechanism which can be adjusted in accordance with the speed of the airplane and its altitude and, when so adjusted, theoretically permits the pilot to determine the proper instant for releasing the bomb before the airplane is over the target.

The adjustment of the bomb sight depends upon the altitude of the plane at the instant of release, which is determined by a barometer, and also upon the actual ground speed which must be measured. The accuracy of aim of the bomb therefore depends not only upon the pilot releasing his bomb at exactly the right instant, but also upon exact determination of the altitude of the plane and its ground speed. If the pilot releases the bomb too soon, the bomb will strike at a point ahead of the target; if too late, the bomb will strike behind the target. Errors in the measurement of altitude of the plane and in its ground speed will cause similar errors in the point of impact of the bomb.

The patentee conceived that these difficulties could be eliminated by the method disclosed in the patent. By flying the airplane to a point substantially over the target, then diving substantially vertically downward at the target and releasing the bomb during the course of such dive, the horizontal component of the bomb velocity is reduced to such a small amount that the error due to it is rendered very small, and the accuracy with which the bombs may be placed correspondingly increased. The airplane is traveling downward with a high velocity when the bomb is released, and thus the bomb is thrown or hurled downwardly at an initially high rate of speed, whereas, when the bomb is dropped from an airplane in horizontal flight, the initial downward velocity at the instant of release is zero. This hurling reduces considerably the time required for the bomb to reach the ground and reduces errors introduced by windage.

A further advantage appears in the matter of safety of the plane and pilot. The pilot may fly over the target at a high altitude so as to be safe from anti-aircraft fire and is exposed to such fire only during the interval of the few seconds during which he is diving vertically upon the target and recovering back to normal flight.

8. More than two years before the date of application for the patent in suit there were available the following patents and publications:

British patent, No. 27405 to von Willisch, 1911.

British patent, No. 15871 to Coanda, 1913.

Austrian patent, No. 64664 to Warchalowski, 1914.

United States patent, No. 1081984 to Peel, 1913.

Scientific American Supplement No. 2103, published by Munn & Co., Inc., of New York, N. Y., on April 22, 1916.

Book, "All About Aircraft," by Ralph Simmonds, published by Cassell and Company of London, New York, Toronto, and Melbourne, in 1915.

The periodical "Flying," published in Great Britain, on December 19, 1917.

The periodical "Flying," published in Great Britain on October 10, 1917.

The periodical "Aeronautics," published in Great Britain on December 1, 1915.

Book, "Aircraft in the Great War," by Claude Grahame-White and Harry Harper, published by T. Fisher Unwin in London, England, in 1915.

The periodical "Flight," published in London, England, December 18, 1914.

A pertinent citation in the prior art is found in the "Scientific American Supplement." In this article there is disclosed not only the horizontal method of bombing described *supra*, but also a method of "nose diving" low over the target and releasing the bomb while the plane is in the "nose dive" pointed directly at the target (termed by the plaintiff the "swooping" method). The disclosure is not quantitative as to the angle at which this "swooping" dive is made, but it is apparent from inspection of Fig. 7, defendant's exhibit 1, reproduced herewith, that the angle of dive is relatively steep. In this article it is stated that "If the aviator dives (Fig. 7) toward his target, accuracy of aim becomes easier, and effective work can be done without scientific instruments; but risk from hostile fire becomes greater." When this method is employed, the airplane is itself flown directly at the target in the dive, and the aiming of the bomb is done by sighting, or aiming the airplane itself, no bomb sight being required. The methods so far discussed are well illustrated in plaintiff's exhibit 10, reproduced herewith, the so-called "swooping" method being shown by curve A, showing the flight of the airplane and the path of the bomb; the horizontal method by curve B; and the method claimed by the patent in suit by curve C.

9. The phraseology of the claims of the patent in suit is comprehensive enough to include diving at an angle at the target. There is no sharp line of demarcation disclosed in the patent, or incorporated in the claims, by which one may determine at what angle of dive one ceases to practice the "swooping" method and begins to practice the method of the patent in suit, if those methods are in fact different. As the angle of dive approaches the vertical, the horizontal component of the bomb velocity is reduced, a matter within the ordinary knowledge of one skilled in the art. From this, one skilled in the art would know that the maximum hori-

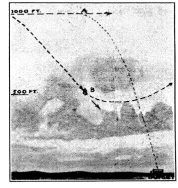
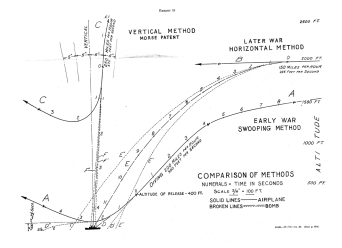


FIGURE 7.—MAKING A DIVE TOWARD THE TARGET.

Leaving out wind pressure, *A* would be the airman's point of release to hit the target while going 40 miles an hour. If, as shown also, he preferred to nose-dive to half altitude, *B* would be his effective point for letting go his bomb.

EXHIBIT 10


2500 FT.
VERTICAL METHOD
MORSE PATENT
VERTICAL
250 MILES PER HOUR
375 FEET PER SECOND
LATER WAR
HORIZONTAL METHOD
2000 FT.
150 MILES PER HOUR
225 FEET PER SECOND
1500 FT.
EARLY WAR
SWOOPING METHOD
ALTITUDE
1000 FT.
DIVING 200 MILES PER HOUR
300 FEET PER SECOND
COMPARISON OF METHODS
NUMERALS = TIME IN SECONDS
SCALE 3/4" = 100 FT.
SOLID LINES——AIRPLANE
BROKEN LINES------BOMB
500 FT.
ALTITUDE OF RELEASE - 400 FT.

zontal component would be impressed upon the bomb in horizontal flight (diving angle of 0°) and the minimum or zero horizontal component would be impressed on the bomb at diving angle of 90°, or vertically downward. It does not appear from the record that any unexpectedly high percentage of accuracy is attained by diving at any particular angle, but on the other hand, as the angle of dive approaches 90°, for any altitude, the displacement of the bomb due to the horizontal component of the airplane's velocity simply approaches zero. It is apparent that as the angle of dive is made steeper, other things being the same, the greater will be the accuracy of aim, the faster will be the speed of the craft in the dive, and the faster the bomb will be hurled at the target; hence, the shorter will be the time during which the bomb will be exposed to wind in its fall and the plane exposed to anti-aircraft fire. These differences, resulting from increasing the steepness of the dive, are not differences in kind but only of degree.

10. The claims, as previously stated, are not limited to a mathematically vertical dive. In this respect the disclosure and claims of the patent in suit are no more definite than the disclosures of the prior art as to the "swooping" method. Neither is quantitative and the only difference apparent between the "swooping" method and that of the patent is that the dive of the latter approaches nearer to the vertical than the former. It is not apparent what test could be applied to determine at what angle approaching the vertical the "swooping" method becomes the method of the patent in suit as the angle of the dive is increased.

11. The claims do not so define the plaintiff's method that it can be determined what is embraced by them.

12. The angle or steepness of the dive to be performed is a matter within the skill of the pilot and depends, among other things, on the ability of the machine to withstand the stresses set up in diving at high rates of speed, the confidence and ability of the pilot to handle the machine properly in steep dives, and the physical condition of the pilot and his ability to withstand the mental and physical strain of steep dives at high rates of speed.

13. During the prosecution of the application which resulted in the patent in suit, while the Examiner did not cite the various publications disclosing the "swooping" method here relied on by defendant, nevertheless the Examiner's position was as follows:

> In view of the well known use of airplanes for dropping bombs it is held to involve no patentable method to drop at a particular time as in nose diving, looping the loop, or while executing any other maneuver known to the pilot.

The Examiner refused to allow any claims and plaintiff appealed to the Board of Examiners in Chief. On appeal, the Board, in its decision on the appeal, stated as follows:

> Claims 1 and 3 are broad enough to be anticipated if the aviator were to dive toward an object in a downward incline and we do not think that such a method would be anything more than a case of direct aiming such as would be obvious to any one and it would be open to the same objections or even worse than the present method, as the altitude of the plane and the horizontal movement would still have their effect on the trajectory of the bomb. We do not consider these claims allowable.
>
> Claims 2 and 6 are limited to pointing the airplane downward when substantially over the target. These claims are held to be allowable.

Claims 1 and 2 of the patent in suit are claims 2 and 6 referred to by the Board of Examiners in Chief. The evidence shows, however, that plaintiff's method in fact is diving at the target in a steep incline as contrasted with the prior art method of diving at less of an incline. The difference is not of kind but of degree, and the results obtained thereby are no more than would be expected by those skilled in the art.

14. The claims in suit are invalid.

The court decided that the plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This patent case is to be determined upon the issue of the validity or invalidity of plaintiff's patent. If the patent is

valid, infringement is admitted. April 12, 1921, the plaintiff obtained the grant of patent #1374314. Following proceedings with respect to plaintiff's original application, the Patent Office finally allowed two of plaintiff's five claims and upon these the plaintiff relies to establish infringement.

The two claims read as follows:

> 1. The method of dropping bombs from aircraft, which consists in pointing the aircraft downward when substantially over the target and in dropping a bomb while the aircraft is diving rapidly downward, whereby the bomb is dropped with a high initial velocity downward and a comparatively small velocity component in a horizontal direction.
>
> 2. The improvement in the art of dropping bombs from aircraft which consists in carrying a bomb attached to an aircraft until it is substantially over a target, then causing the aircraft to dive substantially vertically toward the target, and then detaching the bomb while the aircraft is pointed at the target, whereby the horizontal component of the bomb trajectory is substantially eliminated and the bomb is hurled with a high initial vertical velocity toward the target.

It is manifest from the above claims that the patent is a "method one." No mechanism of any character is involved. The novelty said to reside in the method claimed consists wholly in a claimed change from the old method of approach employed in aircraft bombing toward the target intended to be hit.

The patent specifications describe in detail and at considerable length the inherent difficulties and imperfections in utilizing horizontal flights of airplanes in the process of dropping bombs intended to explode at a certain point. An airplane in horizontal flight can not drop a bomb so the latter will instantly go straight downward. The speed of the airplane naturally imparts to the bomb the moment it is released a component of velocity "approximating that of the horizontal velocity of the airplane."

Obviously the trajectory of the bomb released as above noted will approximate a parabolic one, and will be influenced more or less in its descent by wind and other atmospheric conditions. The altitude of the airplane and its speed at the moment of release of the bomb are vital factors in as-

certaining the results attendant upon effective bomb-dropping.

The aviator in order to ascertain the precise moment to release a bomb in horizontal flying has available what is termed a "bomb sight," a delicate scientific instrument which may be adjusted with the speed and altitude of the airplane, and thus determines for him the moment when he should release the bomb in order to strike the target intended to be hit. The necessity for accuracy and precision in determining when to release the bomb is apparent from the fact that at no moment of release is the aviator exactly above the target to be hit.

If the bomb is released too soon it will strike ahead of the target; if too late, behind it. What we mean is diagrammatically illustrated in Fig. 1, finding 3. We need only say that aiming at a target and successfully striking it are more difficult when the instrumentality employed to discharge the bomb is in a horizontal rather than a vertical position, notwithstanding both instrumentalities are under great speed.

The plaintiff's patent, intended to eliminate the difficulties and imperfections of releasing bombs from an airplane in horizontal flight, depends so far as invention is concerned upon a single change in the angle of flight of the airplane, i. e., from a horizontal to a vertical one, before the bomb is released by the aviator.

The specifications and claims of the patent in suit disclose that the novelty of plaintiff's method is restricted to "pointing the aircraft downward when substantially over the target,"—in other words, converting a horizontal flight into a vertical flight before releasing the bomb. This it is claimed imparts to the bomb a minimum of velocity component in a horizontal direction and a very high degree of velocity to the bomb itself, accomplishing by this method precision in results.

Additional advantages are claimed in the elimination of instruments employed in horizontal bomb dropping, as well as the availability of the method at high altitudes out of the range of anti-aircraft guns. In fact, it is asserted that the higher the altitude of the plane the greater the velocity

imparted to the bomb, and its destructive effect is accelerated. An airplane traveling in a vertical position at great speed releases a bomb; naturally the horizontal component of velocity is eliminated, and the vertical component increased; the time of descent is shortened and the factors of atmospheric disturbances greatly reduced.

The patent does not disclose the discovery of any new scientific principles. It was not new or novel to change the flying angle of airplanes. The plaintiff availed himself of what had long been known, and takes existing mechanisms, alters their course through the air, and insists that by so doing he has pointed out a method original in conception and novel in operativeness. While these facts do not of themselves negative invention, they are essential factors in determining whether it exists.

The plaintiff's application contained five claims. Claim 1 was as follows:

> The method of dropping bombs from aircraft, which consists in causing the aircraft to dive downward toward a target, and in dropping a bomb while the aircraft is so diving, whereby the bomb is given a high initial velocity in a downward direction.

A British patent to von Willisch in 1911 and an additional British one to Coanda in 1913 were cited by the Patent Office as anticipatory, and all five claims were rejected. Claims 1 and 3 were rejected for lack of invention. Claims 4 and 5 were directed to a combination of an airplane and a mechanism to discharge a bomb from the plane. They were rejected and not involved in this suit. The plaintiff did not cancel his claims, but insisted upon their validity, and added to his application what is now claim 1 in suit.

The application was finally rejected by the Primary Examiner, and the plaintiff appealed to what is now the Board of Appeals of the Patent Office. The Board allowed what are now claims 1 and 2 and rejected the others, deciding that inasmuch as these two claims are limited to pointing the airplane downward when substantially over the target and substantially vertical toward the same they are allowable.

The limitation placed upon the claims narrows them to such an extent that it is difficult to ascertain with any degree

of definiteness when and under what circumstances the method involved applies. Again referring to Fig. 1, finding 3, it is apparent that the airplane is in horizontal flight during the process of ascertaining its position "substantially over the target." This portion of flight is excluded from the patent.

The patented method does not begin to function until the airplane descends vertically as far at least as is shown by fig. 7. At this point the specifications state, "The bomb is aimed by aiming the airplane, somewhat as the machine gun in a one-man fighting airplane is aimed. A slight allowance is made for windage and for the residual horizontal velocity of the airplane. The downward dive is commenced when a substantially vertical sight shows the aircraft to be nearly over the target."

Section 4888, Revised Statutes (Title 35, Sec. 33, U. S. C.), is in the following language:

> Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses.

The specifications cited and the language of the claims involved do not point out within any reasonable degree, if at all, any angle of dive. The plaintiff testified that "no exact angle is necessary so long as you are substantially over the target." It is at once obvious that the change from a horizontal to a vertical flight of an airplane engaged in bombing must be determined by the aviator. He and he alone must

adjust the position of his plane in such a way as to make the release of the bomb effective, irrespective of the angle of approach. Finding 12, amply supported by the record, discloses the facts. The aviator is entitled to know unequivocally when he may avoid or infringe the patent.

Keeping in mind that we are concerned with a method or so-called process patent wherein the inventor utilizes an existing apparatus to obtain the results claimed, it is essential that the specifications and claims be sufficiently definite to disclose to those skilled in the particular or analogous arts how the method may be practiced, and when it is being practiced. This rule is axiomatic, predicated in part upon the principle that all specifications and claims must of themselves distinguish the claimed invention from the prior art.

The plaintiff's alleged invention is wholly dependent upon the characteristic principle of the airplane, the bomb to be dropped, and the target to be hit. The process to accomplish practical results exacts precision. The benefits to accrue over the prior art reside exclusively in precision, and if the teachings of the patent place no limitations of sufficient definiteness to instruct one in its use the patent is invalid. As a matter of fact, the novelty claimed for the method specified is precision.

The plaintiff admitted that "if any particular angle were required the method would be practically worthless. It is impossible to ascertain when you are directly over something." The novelty of the patent is described as follows: "its effectiveness is due to the high initial hurling of the bomb when it is released and that was the objective to shoot a bomb weighing 500 or 1,000 pounds without hurting the airplane." In other words, to release a bomb when the airplane is in a "nose dive" infringes the patent, if perchance the plane itself is substantially over the target.

The various attitudes assumed by aviators in bomb dropping, as well as in ordinary flying, are too numerous to mention. The so-called "swooping method" involves a deviation from horizontal flying. The velocity of the plane is determined by existing emergencies and necessities due in part to its altitude in the air. In war times, during aerial combat, the altitude of a bombing plane is subject to numer-

ous changes, and plaintiff's claims do not disclose a definite differentiation from what has taken place before. The disclosure is obscure.

"The claim of a patent is the life of the patent; and either alone or as interpreted by the description, it must clearly and exactly draw the line between the inventions over which the patentee asserts his exclusive rights, and those which are beyond the scope of his monopoly. * * * if it is uncertain, conveying some idea but not precisely specifying its essential characteristics * * * the patent is inoperative * * * and affords no protection to the patentee." Robinson on Patents, Vol. III, Sec. 972, p. 166. *Robins* v. *Wettlaufer*, 81 Fed. (2d) 882.

It would not constitute invention for one to take a rifle from a person shooting at a target from an angular position, and standing erect shoot directly at the target. The advantages of the change exacted no original concept, at least at this late day. Surely the idea of direct flying toward a target to be hit did not involve more than a suggestion of its apparent and well known advantages. It is a scientific fact, common knowledge to those skilled in the art.

PRIOR ART

It is true that no pertinent art was cited by the Patent Office during the prosecution of plaintiff's application. The Primary Examiner rejected all the claims, holding they involved no patentable invention. The fact is immaterial. The defendant introduces a copy of the Scientific American Supplement of April 22, 1916. The article relied upon is entitled "Scientific Bomb Dropping." The author after discussing in detail the method of dropping bombs when the airplane is in horizontal flight, and the instruments used to ascertain the location of the target to be hit, as well as the essential angle of approach thereto, concludes with the following:

> If the aviator dives (Fig. 7) toward his target, accuracy of aim becomes easier, and effective work can be done without scientific instruments; but risk from hostile fire becomes greater.

The reference is challenged by the plaintiff. It is said to be impertinent because the illustration referred to does not

in any sense disclose a comprehension or conception of plaintiff's essential features embodied in his claims.

It can not be denied that the author comprehended and suggested to those skilled in the art the resulting benefits accruing from a steep dive directly toward the target.

The article clearly indicates the advantages gained from increasing the vertical component and decreasing the horizontal component in the approach of the airplane to the target in the bombing operation. What was published is not obscured by ambiguous language.

With these facts as common knowledge, the only factors tending to control the degree of vertical dive would be the physical effect on the pilot and on the structure of the airplane.

If the alleged method of the patent in suit differs at all from this disclosure, the difference is one of degree only and of such a nature as was already apparent to those skilled in the art.

The plaintiff has admitted that a zone of noninfringement obtains extending from the point where the plane departs from its horizontal position to the point where it assumes a vertical one. A skilled aviator reading this article, as the defendant observes, would know how to maneuver his plane to obtain the best results.

A British publication contains an article upon "The Elements of Bomb-dropping," published October 10, 1917. It is to be noted that article appeared during the pendency of the war and the author was handicapped in a great measure by the necessity for secrecy. It does disclose, however, an existing knowledge of the effect of vertical flying in its relationship to bomb-dropping. "If," the author states, "the machine is nose-diving, clearly, the bomb, as it is released, is already possessed with a downward component of velocity which reduces the time taken to reach the ground."

The plaintiff seeks to discredit the article as a pertinent reference, upon the ground that it describes nothing more or less than the "swooping method." The criticism is directed toward the meaning and scope of a so-called "nose dive." The author centers most of his attention to bomb-dropping when the airplane is in horizontal flight, and when

he refers to a "nose dive" and accompanies the reference with the advantages attendant upon such a dive, it is clear he refers to a vertical one, and if for no other reason he attributes to it the same beneficial results the plaintiff claims for his patent.

To comment *in extenso* upon additional references in the record would tend only to lengthen this opinion. The history of the art disclosed in most of them confirms the fact that the execution of horizontal, swooping, and vertical methods of flight by airplanes was old.

In the beginning of the use of airplanes in bomb-dropping, the problem involved not alone the accuracy of aim at the target, but the construction of the plane and its ability to withstand the rigors of the service. It is, we think, no answer to a charge of invalidity of the patent involved that vertical flying without the use of instruments to spot the target was not resorted to at once. Those skilled in the art were well aware of and stated the attending features of vertical flying, and to adapt it to bomb-dropping exacted no more than awaiting the presence of airplanes suitable and sufficient in construction to do so.

This case is not similar in principle to the case of *Tilghman* v. *Proctor*, 102 U. S. 707. In that case, involving a mechanical and chemical process, the inventor discovered a new method or process of manufacture and added a new element which produces the knowledge that the product desired could be brought into being by an undiscovered process of chemical change.

What the plaintiff claims, and all his claims implicate, is that novelty resides in pointing downward an airplane in flight directly at the target to be hit and releasing the bomb when substantially over it, thereby increasing the initial velocity of the bomb and obtaining accuracy in result. This, we think, did not develop a new scientific fact or produce a new and novel method not within the knowledge of those skilled in the art.

The petition will be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

Reporter's Statement of the Case

SAMUEL PLATO v. THE UNITED STATES

[No. 43190. Decided April 4, 1938]

On the Proofs

Contract for construction of post office; delay on the part of the Government.—Where contractor is delayed by the Government in the prosecution of work under a contract, he is entitled to recover as damages the expenses and costs incurred by reason of such delays; and the Government is not relieved from liability by merely extending the contractor's time for the completion of the contract. *See Phoenix Bridge Co.* v. *U. S.*, 85 C. Cls. 603.

Same.—Claims for damages resulting to a contractor because of delays on the part of the Government are not disputes which under the provisions of the contract are to be submitted to and decided by the contracting officer.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. John W. Gaskins* was on the brief.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Samuel Plato, plaintiff, on December 19, 1932, entered into a contract with the defendant by which, for the consideration of $79,750, he agreed to furnish the labor and material, and perform all work required for the construction, including approaches, of a post office at Phillipsburg, New Jersey. The contract, together with the accompanying drawings, schedules, and specifications, are by reference made a part of this finding. On January 16, 1933, plaintiff received notice to proceed which, under the terms of the contract, fixed the date of completion at 360 calendar days thereafter.

2. On January 5, 1933, plaintiff was requested to bid on ten proposed changes. On February 4, 1933, and on February 6, 1933, plaintiff submitted his bids on ten separate proposals for additions to the contract.

Some of the changes involved material alterations. The lowering of concrete slabs and the installation of membrane type waterproofing became important in the early construction because it became necessary to lower the footings of the building wherever the slabs were required; the footings were a part of the foundations, and plaintiff could not proceed with this work until he knew whether the defendant wished him to do this work. Another of the ten proposed changes which involved material alterations required the lowering of slab S-14 five inches, installation of gray granite floor in Arcade, and construction of reinforced concrete slabs at the steps. Plaintiff could not prepare his shop drawings for submission to defendant nor could his reinforcing steel be fabricated until he knew whether this work was to be done. Defendant's delays in its decision regarding these two proposed changes prevented plaintiff from proceeding with his plans for laying out the work.

3. On March 15, 1933, plaintiff requested a 90-day extension of time because of his loss of time while awaiting defendant's decision on the proposals. On April 5, 1933, plaintiff wired defendant that the job was practically at a standstill awaiting its action. On April 11, 1933, defendant advised plaintiff that due to necessary Governmental economy the proposals were rejected. On May 2, 1933, defendant advised plaintiff that due to its delay in advising him regarding bids he was entitled to 60 additional days.

Because of defendant's delay in passing on the proposals most of the work which normally would follow the excavation was almost at a standstill until April 11, 1933. During that period of delay plaintiff excavated driveways, which work normally would have been delayed until near the end of the job.

4. The contract provides for a brick building. Most of the face brick was to be of special design to be laid in a way to represent rosettes, plaques, medallions, statues of men and other ornaments. A large number of different shapes and designs of bricks had to be specially manufactured for this particular job from models which were to be supplied by defendant. The brick manufacturers could not proceed without such models as in the manufacture of

these special bricks it was necessary that molds be manufactured after the receipt of defendant's models; that brick be cast in said molds; that brick be then burned for three weeks; and that another week be allowed for cooling. This process, together with the time necessary for the loading and shipping to the premises, required about seven weeks.

5. In their plans of progress, both plaintiff and defendant calculated that said models should have been delivered to plaintiff by March 1, 1933, which would have allowed delivery of the special brick at the job by May 1, 1933. Had the special brick been so delivered it would have allowed plaintiff the three summer months of May, June, and July for the completion of all brick work, which would have given him ample time. However, defendant's delay in passing on the proposed changes (finding 2) would in itself have delayed the laying of the brick until about April 15, 1933. As soon as this delay was evident, plaintiff revised his brick plan and decided to start the brick work about June 1, 1933, to complete same by about September 1, 1933, and have the building under roof by September 21, 1933. This plan would have permitted plaintiff to supply temporary heat thereafter for the remainder of the interior work in the building.

6. When plaintiff was notified to proceed on January 16, 1933, defendant had not supplied him with the models from which the special brick was to be manufactured. When the models had not been received by plaintiff on March 15, 1933, he complained to defendant of the delay and requested an extension of time. When the models had not been received on April 5, 1933, plaintiff advised defendant that the building was practically at a standstill, pending its action. On May 2, 1933, defendant advised plaintiff that it was not possible to award the model contract until a policy had been determined in connection with the public building program, and that when plaintiff received the models, for him to determine the exact number of days he had been delayed on that account and advise defendant. On May 5, 1933, plaintiff advised defendant that due to lack of models operations would cease on the job on or about June 10, and further advised defendant

that it was going to be an expensive operation for plaintiff as he had his organization all there for the execution of the work. On several occasions thereafter plaintiff called at defendant's office regarding this delay and was further advised by defendant that due to a lack of Government policy with respect to public buildings defendant could not let a contract for the models. Shortly after May 5, 1933, plaintiff began laying off men and tapering down the work in an effort to maintain an organization on the job, composed in the main of foremen and keymen.

7. Defendant had its construction engineer on the job during its entire progress. He made monthly progress reports on the work, which reports are by reference made a part hereof. The progress reports cover the months from February 1933 to August 1934, both inclusive. Each monthly report shows plaintiff's equipment to be satisfactory. The following partial review of data contained in the monthly report tends to show conditions prevailing on the job during the period plaintiff claims it was delayed by defendant's failure to comply with provisions of the contract.

February 1933: 3.20 percent of work completed; progress satisfactory; sewer pipe on job.

March 1933: 6.00 percent of work completed; progress slow due to rock excavations and bad weather; materials sufficient for present needs.

April 1933: 14.56 percent completed; progress satisfactory; models for special brick 60 days overdue.

May 1933: 20.81 percent of work completed; progress satisfactory; enough materials delivered for present needs.

June 1933: 36.28 percent of work completed; progress satisfactory; brick held up.

July 1933: 41.78 percent of work completed; progress slow, waiting on brick models and brick; brick held up since June 15th.

August 1933: 42.09 percent of work completed; work stopped on August 8th, lack of face brick; face brick expected about Oct. 1, 1933; brick work was held up due to lack of brick models.

September 1933: 47.36 percent of work completed; progress slow, waiting for brick specials expected October 20;

specials promised for Oct. 1st, held up for lack brick models; contractor for brick models should be pushed for completion.

October 1933: 54.56 percent of work completed; delivery of material sufficient for present needs; cast stone delayed by approval of material; request was made to extend time of completion for 132 days account delay brick model contract.

November 1933: 60.67 percent of work completed; shipments of special brick shapes slow in arriving; work delayed 8 days on account of bad weather.

December 1933: 63.13 percent of work completed; progress slow due to bad weather; worked only 8 days out of the month due to bad weather.

January 1934: 68.16 percent of work completed; progress slow due to bad weather; lost 8 days account bad weather.

February 1934: 72.64 percent of work completed; progress slow due to bad weather; delivery of materials sufficient for present needs.

March 1934: 78.89 percent of work completed; few model brick short.

April 1934: 82.88 percent of work completed; progress slow due to not having sufficient men on the work; brick work complete with the exception of front arches and some patching.

May 1934: 88.40 percent of work completed; all material on job except ornamental metal and ventilator for lookout.

June 1934: 95.14 percent of work completed.

July 1934: 98.23 percent of work completed.

August 1934: 99.70 percent of work completed.

8. On July 8, 1933, plaintiff advised defendant that pending receipt of the models he was forced to stop work indefinitely. On July 10, 1933, he advised defendant that the delay was causing him great loss for which he hoped to be reimbursed. The weather during June, July, and August, 1933, was such that if brick were available they could have been laid about every day. From June 10, 1933, to July 8, 1933, plaintiff kept his organization on the site, working them on plumbing, concrete, and steel. After July 8, 1933,

he reduced his force to only his keymen as the work was about at a standstill.

On July 15, 1933, defendant advised plaintiff that it was trying to have models completed as soon as possible, requesting plaintiff to forward defendant a definite request for extension of time as soon as the models were received. The first shipment of models was received by the brick manufacturer on August 25, 1933, and the last shipment on October 25, 1933. On October 26, 1933, plaintiff requested an extension of 132 days' time, from June 15, 1933, to October 25, 1933, on account of defendant's delay in furnishing the models. Plaintiff's request for an extension was granted on November 20, 1933, the ruling of the acting supervising architect appearing in his letter to plaintiff, reading as follows:

> In connection with your contract for the construction of the Post Office at Phillipsburg, N. J., reference is made to your letter of October 26, 1933, asking consideration of 132 additional days, due to the delay occasioned by the lack of models.
>
> Our records verify the facts cited in your letter concerning this delay. You were advised in letter of May second that the delay in awarding the model contract was caused while awaiting the determination of a policy in connection with the Public Building Program, and you were advised that when the models were received you should inform this office of the number of days you were delayed. The model contract was awarded on June 14th. The last of the models were approved for shipment on October 11 and the Engineer verifies the fact that you received the shipment of special brick on October 25th. The lack of brick models had held up the shipment. The Engineer also reports that you were ready for the brick work on June 15th and the delay therefore dates from June 15th to October 25th. Some of the delay in the furnishing of the models was due to a misunderstanding of the Architect for the building concerning the information which he was to furnish the modeler. As you have no control over these conditions and were not in any way to blame, you are entitled to one hundred thirty-two (132) additional days on this account, due note of which will be made at time of final settlement.

9. On October 25, 1933, common brick had been laid to the first floor line. At this point special brick were to be first laid. As soon as special brick arrived plaintiff began laying them in order to avoid as much as possible the approaching cold weather. The first special brick were delivered on the site on October 25, 1933. Certain types of brick were not available when needed due to the manner in which the models had been delivered. Under these conditions plaintiff had to omit such places where such brick were needed, coming back to them when such brick became available.

Weather conditions during the winter of 1933–34 were not favorable for the early completion of this part of the contract. Plaintiff introduced as exhibit 13 "Climatological Data," a publication of the U. S. Department of Agriculture, which together with other testimony, established the following conditions as to weather at and near the site during the six months from November 1933 to April 1934.

November 1933: Average minimum temperature at Phillipsburg for the month 30.3 degrees; on 28 of the 30 days the temperature fell below 40 degrees; average temperature for the State of New Jersey was the seventh coldest in the past 49 years.

December 1933: Average minimum temperature for the month was 23 degrees; temperature fell below 40 degrees every day; on one day temperature fell to 2 degrees below zero.

January 1934: Average minimum temperature for the month was 24.9 degrees; temperature fell below 40 degrees every day; temperature one day 7 degrees above zero.

February 1934: Average minimum temperature for month 8.4 degrees; temperature fell below 40 degrees every day; temperature at Phillipsburg one day 9 degrees below zero; temperature on site on one day was 23 degrees below zero; record cold weather prevailed over the State of New Jersey, averaging 18.6 degrees below, the lowest ever recorded.

March 1934: Average minimum temperature for the month 25.5 degrees; temperature below 40 degrees every day.

April 1934: Average minimum temperature for the month 37.9. Temperature was at or below 40 degrees on 22 of the 30 days.

The site of plaintiff's work was about one mile removed from the Weather Bureau Station at Phillipsburg, where most of the above-mentioned temperatures were recorded, and conditions prevailed at the site of the work similar to those prevailing at the Weather Bureau Station. During the six months referred to above, considerable snow fell at the site.

10. The laying of brick continued from October 25, 1933, to March 7, 1934. On March 21, 1934, the building was enclosed by roof. Paragraph 223 of the specifications, respecting brick work, provided:

> *Protection.*—Masonry shall not be laid in freezing weather unless suitable means are used to heat the materials or to protect the work from cold, or both if necessary, that the mortar shall properly harden without freezing and that no damage from frost shall occur. The minimum of protection required shall be to maintain the work after placing at a temperature of at least 40 degrees F. for not less than 24 hours. No anti-freezing ingredient shall be mixed with the mortar. The tops of all walls and piers shall be covered with waterproof temporary protections during storms, and when work is stopped for the day.

In order to pre-heat the brick before installation plaintiff wheeled the brick inside the building, stacked them in rings and placed salamanders inside the rings; sand used in the mortar was heated both by steam coils and salamanders; water was heated in a steam boiler; materials thus pre-heated were then placed in a mixer. The pre-heated brick and mortar were placed into the masonry wall, where it was necessary, in order to maintain a temperature of 40 degrees for twenty-four hours, to build temporary partitions of wood over the walls, inside of which salamanders were placed. Plaintiff expended $48 for tools, material, and labor required in the building of 12 salamanders, which were junked at the end of the job; $300 for fuel used in firing the salamanders, and $520 for labor in

handling and placing brick around the salamanders, which sum was calculated at $2 per thousand for 260,000 brick. Plaintiff also expended $720 as salary of two men attending the salamanders and coils, which was calculated at $4 per day, per man, for the period of 90 days; and he paid $720 to the man who fired the boiler, at the rate of $8 a day for 90 days. These three men were deemed necessary, as one was charged with the duty of firing the boiler at all times, and the other two attended to the salamanders and the materials over the steam coils. Plaintiff expended $280 on account of labor in building temporary partitions enclosing the brick walls in which the salamanders were placed, and $160 for materials used in building such temporary partitions, or a total expenditure of $2,748.00.

11. Paragraph 108 of the specifications concerns cement, and provides:

> *Protection from cold.*—No concrete or cement work shall be done in freezing weather unless suitable means are used to heat the materials before placing and to protect the concrete after placing so that no damage from frost or freezing shall occur. Protection after placing shall include the using of temporary heat and covering if necessary. No anti-freezing ingredient shall be mixed with concrete or cement work.

More than 90 percent of the concrete work had to be placed after the brick work started, and during cold weather, which seriously affected the laying of concrete; the aggregates were heated with salamanders and steam coils; the water was heated to a boiling temperature, and the concrete was thus mixed. If water runs under concrete and freezes it will crack the concrete; with this thought in mind plaintiff proceeded to protect the concrete in the basement floor and first floor slab; he covered it all with tar paper on top of which he placed a layer of wood, approximating 4,000 feet of lumber; he then placed 4 inches of sand over the paper and lumber; the sand when brought to the site was loaded into wheelbarrows, carried on the job and spread upon the floor; later he removed the material by trucks, which material had no salvage value. Despite this protec-

tion the floor in the basement and first floor slab buckled at several places, in one place it lifted six inches in the middle. In providing this protection plaintiff used 16 rolls of paper, costing him $2.30 per roll, or $36.80; 4,000 board feet of lumber, at $20 per thousand, or $80.00; and 260 cubic yards of sand, at 75 cents per cubic yard, or $195.00. The labor for placing and depositing the paper cost plaintiff $20; the placing and depositing of the lumber $40; the labor for hauling sand into the building and placing it $150; and he expended $310 for labor for removing the sand, loading it into carts and taking it away, or a total expenditure of $831.80.

Under his original plan of progress plaintiff expected to pour the structural roof slab by September 10, 1933, but it was poured during freezing weather and was not completed until March 21, 1934. The beams were covered with lumber, paper, and tarpaulins, where they were permitted to remain until warmer weather would permit concrete operations; similar precautions were taken with respect to the roof slab; when pouring concrete, salamanders were fired from the floor below, which heated the bottom side of the slab, and 12 inches of hay were placed upon the top of the slab. Plaintiff, in the protection of the structural concrete roof slabs and beams, expended $78 for lumber, $60 for paper, $72 for hay, $164 for the hauling and placing of the materials, and $246 for removing and hauling away the materials, or a total of $620.00.

12. During the winter season and while the building was not under roof, plaintiff was required to remove snow and ice from the walls and scaffolds before his men could begin the day's work, which frequently required two hours of such preparation before the men were ready to go to work. This extra work cost plaintiff $270. Although plaintiff installed temporary heat throughout the winter, he was able to maintain a uniform temperature only in the basement, and even there frost formed under the basement floors, and water under the floors froze and cracked them in several places. In attempting to maintain this uniform heat, at the cost of $200, plaintiff erected 40 temporary en-

closures for openings. Between October 25, 1933 and March 21, 1934, there were 68 days during which low temperatures caused the freezing of materials even after having been preheated, and on these 68 days plaintiff was forced to stop operations. While the weather did not entirely stop the men from working it impaired their efficiency and caused a loss of time when the men stopped to get warm. Including 68 days that were lost when temperatures were so low as to prevent any work, the cold weather brought about a decrease of efficiency of said employees which plaintiff estimates at 15 percent, resulting in a loss of $1,163.22.

Under plaintiff's plan of operation the building was to be completed within 300 days, allowing several weeks in which to correct any omissions and defects. However, the work was not completed until 572 calendar days had expired, same being 212 days more than the time allowed by the contract. Because of this protracted period of performance plaintiff sustained losses, which, based upon the 192 days' time allowed by defendant as an addition to the contract, are as follows:

Plaintiff, as his own superintendent, at $60 per week; masonry foreman at $50 per week; carpentry foreman at $45 per week; timekeeper at $22 per week; bookkeeper and stenographer at $15 per week, a total of $192 a week, which, when calculated for the 192 days, amounts to $5,260.80. During said 192 days, plaintiff had at the site of the work, plant, equipment, and tools of the value of $6,010, the rental value of which, at $10 per day, less 30 Sundays and holidays, amounts to $1,620. During the period of 192 days he paid the sum of $99.06, on account of the following items: Telephone charges at his field office in the sum of $34.28; progress photographs at a cost of $36; expense for water $14.78; and $14 for electricity used in the field office.

13. On January 16, 1934, plaintiff submitted his shop drawings of lighting fixtures for approval. The lighting fixtures were to be hung in the roof slab. Plaintiff could not pour his concrete at that point until the shop drawings had been approved. On February 14, 1934, plaintiff asked

for an early approval of the drawings. On March 29, 1934, plaintiff again requested approval in order to permit him to proceed. In order to shorten the delay in the approval of the shop drawings plaintiff made trips to Washington, D. C., New York City, Bessemer, Pennsylvania, and Canton, Ohio, in his efforts to secure an early approval of the shop drawings. Plaintiff expended in traveling the amount of $152.

14. The work under this contract was substantially completed on August 11, 1934. On August 23, 1934, defendant submitted its list of omissions and defects, all of which were supplied and corrected by September 26, 1934. The building was formally accepted on October 23, 1934, defendant waiving liquidated damages. During the entire progress on the job plaintiff at no time presented to defendant, in writing, any bill or claim specifically covering the items here in suit. On September 28, 1934, plaintiff, by letter, advised defendant that all omissions and defects had been taken care of and stated: "This being the last item of defects against this proposition, I trust now that I may soon have a settlement in full in connection with that job." On October 8, 1934, plaintiff executed and delivered to defendant a voucher for the payment of $4,901.65. On October 23, 1934, defendant notified plaintiff that final settlement of the contract in the amount of $4,901.65 was approved and that a check would be forwarded to him shortly. Accordingly, defendant thereafter issued its check in the amount of $4,901.65, payable to plaintiff, which was received and negotiated by him.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The defendant in this case admittedly delayed plaintiff 192 days in completing the work under the contract. The delay operated to increase the cost of the work by protracting the period of performance and by making it necessary for practically all the exterior work to be performed under severely adverse winter conditions, which would not have

been encountered but for the delay. The question for decision is whether or not the plaintiff can recover his proven losses resulting from the delay.

Article 15 of the contract provides:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Plaintiff did not present to the contracting officer for his decision during the progress of the work, at the time of its completion or afterwards, any of the claims for damages asserted in suit. The defendant contends that because of the failure of plaintiff to do this the court is without jurisdiction to consider his claims, and that he is precluded from recovery.

The rule of the law is well settled that it is competent for parties to a contract like the one here involved, to contract that the decision of the contracting officer, or other officer, of all specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that in the absence of fraud or mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts, and that a contractor who fails to avail himself of his right to submit such questions of fact to the contracting officer for decision will not be granted relief by the courts. The defendant has correctly stated the law on this subject in its brief. However, it has nowhere been held by this court, or the Supreme Court, that claims for damages resulting to a contractor because of delays on the part of the Government are of the character of disputes contemplated in Article 15 of the contract which are to be submitted to and decided by the contracting officer, or his duly authorized representative.

This court has recently decided that precise question in *Phoenix Bridge Co.* v. *United States*, No. 42084, 85 C. Cls. 603. Article 15 of the contract in that case relating to disputes was quite similar to article 15 of the instant case. The Government in that case contended that as a prerequisite to suit, a claim for damages arising out of delay on the part of the Government had to be presented to the contracting officer for decision. The court rejected this contention:

> Counsel for defendant appear to contend that the court may not award plaintiff damages for delay caused by the defendant for the reason that plaintiff did not submit its claims for unliquidated damages to the contracting officer. But there was no provision in the contract requiring that this should be done as a condition to plaintiff's right to sue, or as a condition to the exercise of jurisdiction over the claims by the court. Art. 15 of the contract related to disputes but makes no reference to the matter of submission of claims for damages for delays caused by the defendant. Art. 9 of the contract provided that plaintiff should notify the contracting officer of the delays and that such officer should ascertain the facts and extent of the delay but does not provide for the submission of damage claims for such delays. Paragraph 20 of the specifications related to the filing of protests. Art. 3 of the contract related to changes; Art. 4 concerned changed conditions, and Art. 5 related to extra work. None of these provisions required plaintiff to submit to the department its claims for the amount of damages for delays. In *Clyde* v. *United States*, 13 Wall. 35, 39, the court held that to require claimants to first submit their claims to the department was "establishing a jurisdictional requirement which Congress alone had the power to establish."

This court has held in cases too numerous for citation here that where a contractor is delayed by the Government in the prosecution of work under a contract, he is entitled to recover as damages the expenses and costs incurred by reason of such delays. The Government is not relieved from liability by merely extending the contractor's time for the completion of the contract. The costs and expenses to plaintiff by reason of the defendant's delay of the completion of the

Syllabus

contract for 192 days is shown by the findings to be $12,-494.88. Plaintiff is entitled to recover and judgment will be entered in that amount.

It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

FREDERICK PLEASANTS v. THE UNITED STATES

[No. 43278. Decided April 4, 1938]

On the Proofs

Income tax; deduction of charitable contributions from taxable net income without diminution on account of capital net loss.—Under the Revenue Act of 1932, the net income specified in section 23 (n) as the base for the calculation of the deduction for charitable contributions is, and was intended by Congress to be, the net amount upon which the taxpayer is taxable under sections 11 and 12; this was the gross income less all possible deductions.

Same; capital net loss.—Where there is a "capital net loss" as defined by the statute, such loss, by express provision of the statute, is excluded and denied as a deduction in determining the net income subjected to the tax imposed; and such "capital net loss" cannot be deducted from the taxable net income for the purpose of ascertaining the amount allowable as a deduction on account of charitable contributions.

Same; deduction for charitable contributions.—In the enactment of the provisions with reference to capital net gains and capital net losses, Congress did not in any way evidence a purpose to take away or limit the right of an individual taxpayer to deduct from net income, subject to tax, his charitable contributions in an amount not exceeding 15 percent of such taxable net income; and the contrary method employed by the Commissioner in determining whether the taxpayer is entitled to such deduction was theoretical and not authorized by either the language or the intent of the statute.

Same.—Since "net income" is a statutory concept, a capital net loss, which is not an allowable deduction under section 23 in determining the net income for the purpose of the tax imposed by sections 11 and 12, may not be deducted from such net income to deny or reduce the deduction which Congress since 1917 has consistently given to individual taxpayers for charitable contributions; any other construction would disregard legislative history of persuasive force.

Reporter's Statement of the Case

Same.—Charitable contributions are "ordinary deductions" under section 23 and in the case of a taxpayer having a capital net loss his *net income* as defined by section 23 (n) for the purpose of computing the allowable deduction for charitable contributions is "ordinary net income", which is the base for the calculation of the tax.

Same; history of legislation.—Reviewing the history of legislation relating to deductions for charitable contributions and to capital losses, the court held that there is nothing in this history showing any intent on the part of Congress to reduce or take away the deduction for charitable contributions.

Same; contrary decisions reviewed.—The court is unable to concur with a group of decisions cited (beginning with *Lockhart* v. *Commissioner*, 32 B. T. A. 732, affirmed C. C. A., 3rd Circuit; 89 Fed. (2d), 143) in which it was held that a capital net loss, although not a permissible deduction under Section 23 for the purpose of determining net income subject to the tax imposed by sections 11 and 12, might, nevertheless, be deducted from such net income to determine the amount on which the 15 per-cent limitation for charitable contributions was to be computed, on the ground that this conclusion was required by the opinion of the Supreme Court in *Helvering* v. *Bliss*, 293 U. S. 144; the question involved does not appear to have been considered or decided by the Supreme Court, and it is held that the decision lends greater support to the position of the plaintiff than to that of the defendant.

Same.—Where there is a capital net gain, such gain is a part or all of the taxpayer's net income, but where there is a capital net loss the ordinary net income is the taxpayer's entire statutory net income.

The Reporter's statement of the case:

Mr. Frederick Schwertner for the plaintiff. *Delafield, Thorne & Marsh; Lowenhaupt, Waite & Stolar; George H. Warrington,* and *Wright & Rundle* were on the brief.

Mr. Frederick E. S. Morrison amicus curiae, and *Drinker, Biddle* and *Reath* were on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

In this case plaintiff seeks to recover $969.79, with interest, alleged overpayment of income tax for 1932 and interest thereon, on the ground that the Treasury Department er-

roneously and illegally refused to allow him a deduction in accordance with section 23 (n) of the Revenue Act of 1932 (47 Stat. 169) of $3,496 for charitable contributions made within the taxable year.

Plaintiff had a capital net loss of $154,921.98, which, by express provision of the statute, was not, in the case at bar, a permissible deduction, and could not be deducted by the taxpayer or the department in determining the net income of plaintiff which was to be subjected to the tax imposed by sections 11 and 12 of the Revenue Act of 1932. The net income of plaintiff for the taxable year, that is, the net amount upon which he was subject to tax after allowing all authorized and permissible deductions, except charitable contributions, was $94,963.52. In determining whether plaintiff was entitled to any deduction from taxable net income because of his contributions to charity, the Commissioner of Internal Revenue held that the capital net loss above mentioned should be deducted from "ordinary income" in order to determine whether plaintiff had a "net income" within the meaning of Section 23 (n) for the purpose of the allowance of the deduction for charitable contributions under that section. By this process there was produced a net loss from all operations for the year of more than $59,000. The Commissioner, therefore, held that plaintiff had no "net income" for the purpose of the deduction for charitable contributions but, at the same time, he held, as provided by Section 101, that the capital net loss was not a deduction for the purpose of determining "net income" subject to tax and proceeded to levy and collect from plaintiff a tax at the rates prescribed by the statute upon a net income of $94,963.52 less the authorized credit against the tax thus determined of 12½ percent of the capital net loss of $154,921.98. Plaintiff contends that the method employed by the Commissioner to deny any deduction for charitable contributions was erroneous and illegal for the reason that the base for the calculation of the deduction for charitable contributions, which the statute limits to 15 percent of the net income, is the net amount upon which the taxpayer is subject to be taxed—the base for

the calculation of the tax. Counsel for defendant contend that the Commissioner's method was correct and in accordance with the provisions of the Revenue Act of 1932.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. For 1932 plaintiff filed his individual income tax return on March 15, 1933, showing a total tax of $161.77, which was paid on the same date. He reported his income, deductions, losses, and tax as shown in the return attached to the petition as exhibit "B," which is made a part hereof by reference. In that return he reported in line 12 a total income of $99,123.31 consisting of salaries, interest, and dividends, and on line 19 of the return he reported total deductions of $5,235.15 consisting of taxes paid, losses by fire, storm, etc., and, under item 17, contributions. Plaintiff also reported in line 32 of the return under the heading "Computation of Tax" a capital net loss of $157,642.62.

2. In arriving at the total deduction of $5,235.15 shown on line 19 of this return, plaintiff included therein as a deduction the amount of $3,496, representing contributions or gifts made by him within the taxable year 1932 to the St. James' Church, Community Chest, Red Cross, Salvation Army, Y. M. C. A., and other charitable institutions, within the purview of section 23 (n) of the Revenue Act of 1932.

3. The Commissioner of Internal Revenue caused an investigation and audit to be made of plaintiff's books and records, and his return for 1932, and, on January 20, 1934, pursuant to the instructions of the Commissioner, the Internal Revenue Agent in Charge at Newark, New Jersey, made such investigation and audit and on February 20, 1934, prepared and submitted a report to the Commissioner. A copy of this report, consisting of five pages, is attached to the petition as exhibit "D" and is made a part hereof by reference.

The Internal Revenue Agent in Charge determined the plaintiff's gross income to be $96,702.67 instead of $99,123.31, as reported by plaintiff on line 12 of his return, and the total deductions to be $1,739.15 instead of $5,235.15, as re-

ported by plaintiff on line 19 of his return. In so reducing the total deductions from $5,235.15, as reported by plaintiff, to $1,739.15, the Internal Revenue Agent in Charge disallowed as a deduction the charitable contributions in the amount of $3,496, as set forth in finding 2, on the ground that the capital net loss was a proper deduction in determining the "net income" for the purpose of the deduction for charitable contributions under section 23 (n), and since the ordinary net income reduced by the capital net loss resulted in a net loss for the year there was no income against which to apply the deduction for charitable contributions. The Internal Revenue Agent in Charge also determined plaintiff's capital net loss to be $154,921.98 instead of $157,642.62, as reported on line 32 of the return. The total tax assessable against the plaintiff as shown in the audit by the Internal Revenue Agent in Charge as set forth in his report hereinbefore mentioned was $1,070.69, or $908.92 in excess of $161.77, which amount the plaintiff had reported and paid as set forth in finding 1. This additional tax resulted entirely from the disallowance of the deduction for charitable contributions in determining net income subject to tax.

4. The Commissioner upon examination and audit of plaintiff's return in connection with the report of the Internal Revenue Agent in Charge, approved the findings, audit, and computation of the tax recommended by the Revenue Agent in Charge and so notified plaintiff on April 13, 1934. Plaintiff's taxable net income for 1932 was $94,963.52 before any deduction for charitable contributions. The deficiency in tax of $908.92, together with interest thereon of $60.87, aggregating $969.79, was thereafter assessed and upon demand the same was paid May 12, 1934.

5. Thereafter, May 19, 1934, plaintiff duly filed a timely claim for refund for $969.79 for 1932 on the ground that the amount of $3,496 representing contributions to charity, being less than 15 percent of his taxable net income, was a proper and legal deduction under section 23 (n) of the Revenue Act of 1932 in computing his net income subject to tax. The Commissioner rejected this claim in its entirety on

January 17, 1935, giving as his reasons therefor the following:

> In this connection you are advised that in the cases of Susan Dwight Bliss v. Commissioner and William Albert Harbison v. Commissioner, decided November 5, 1934, the Supreme Court of the United States decided that the base for computing the 15 per cent limitation on contributions is the gross income less all permissible deductions save contributions, regardless of whether the tax is computed under the capital net gain or net loss provisions of the Revenue Acts prior to the Revenue Act of 1934.
>
> In accordance with the above decision the ordinary net income must be reduced by the amount of the capital net loss in order to arrive at the base on which to compute the 15 per cent limitation for contributions. Since the capital loss of $154,921.98 is in excess of adjusted ordinary net income of $94,963.52 (without contributions) there is no net income against which to make a deduction for contributions. Contributions claimed in the amount of $3,496.00 cannot therefore be allowed.

6. If plaintiff is correct in his contention that the charitable contributions totaling $3,496 for 1932 constituted a proper and legal deduction from his net income which was subject to be taxed under the Revenue Act of 1932 without diminution on account of the capital net loss sustained for that year, he is entitled to recover the additional tax and interest collected thereon totaling $969.79, together with interest on this amount from May 12, 1934.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

All of the sections hereinafter mentioned are found in the Revenue Act of 1932, unless otherwise stated. Section 23 (n) relating to charitable contributions, which is in substance the same as the provisions covering that subject incorporated in all the revenue acts beginning with section 1201 (2) of the Revenue Act of October 3, 1917 (40 Stat. 300), provides as follows:

> In computing net income there shall be allowed as deductions: * * *
>
> (n) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of: * * * (2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; * * * to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. * * *.

Section 21 provides that the "'Net income' means the gross income computed under section 22, less the deductions allowed by section 23." Sections 11 and 12 relating to the tax on individuals impose a normal tax of 4 and 8 percent and a surtax ranging from 1 to 40 percent "upon the net income of every individual."

The question in this case is whether "the taxpayer's net income" mentioned in section 23 (n), quoted above, means the net income which the statute subjects to the tax imposed by sections 11 and 12—that is, the net amount upon which the taxpayer is liable for a tax, except for its reduction for charitable contributions—or whether "the taxpayer's net income," which section 23 (n) makes the base for the calculation of the allowable deductions for charitable contributions, means the taxpayer's gross income less the deductions allowed by section 23 (other than charitable contributions) *plus* the deduction of the capital net loss which is not a permissible or allowable deduction under section 23 or any other section in determining "the net income" to be subjected to the tax imposed by sections 11 and 12, except under certain circumstances not material here, but which will hereinafter be referred to. It is our opinion that the net income specified in section 23 (n) as the base for the calculation of the deduction for charitable contributions is, and was, intended by Congress to be the net amount upon which the taxpayer is taxable under sections 11 and 12—

i. e. $94,963.52. This was plaintiff's gross income less all permissible deductions. Where there is a "capital net loss" as defined by the statute, such loss, by express provision of the statute, is excluded and denied as a deduction in determining the net income to be subjected to the tax imposed. See section 101 (c) (7). The pertinent sections of the Revenue Act of 1932, so far as material here, are as follows:

SEC. 11. NORMAL TAX ON INDIVIDUALS. There shall be levied, collected, and paid for each taxable year upon the *net income* of every individual a normal tax equal to the sum of the following: * * *

SEC. 12. SURTAX ON INDIVIDUALS. (a) Rates of surtax.—There shall be levied, collected, and paid for each taxable year upon the *net income* of every individual a surtax as follows: * * *

SEC. 21. NET INCOME. "Net income" means the gross income computed under Section 22, less the deductions *allowed* by section 23.

SEC. 22. GROSS INCOME. (a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, * * *; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME. In computing *net income* there shall be *allowed* as deductions: (a) Expenses * * * (b) Interest * * * (c) Taxes Generally * * * (d) Taxes of Shareholder Paid by Corporation * * * (e) Losses by Individuals.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—* * * (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; * * * (j) Bad Debts * * * (k) Depreciation * * * (l) Depletion * * * (n) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of: * * * (2) a corporation, or trust, or community chest, fund, or foundation, organized and operated ex-

clusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; * * * to an amount which * * * does not exceed 15 per centum of the taxpayer's *net income* as computed without the benefit of this subsection.

SEC. 101. CAPITAL NET GAINS AND LOSSES. (a) Tax in Case of Capital Net Gain.—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) Tax in Case of Capital Net Loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) Definitions.—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by Section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by Section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the *net income*, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. * * *. [Italics supplied.]

The Commissioner of Internal Revenue held in his construction of sections 23 (n) and 101 which, so far as this question is concerned, are the same as the related sections of the Revenue Acts of 1924, 1926, and 1928, that if a taxpayer sustained a capital net loss which by express provision of the statute could not be taken as a deduction in computing taxable net income, such capital net loss must nevertheless be deducted from the net income which the statute specified should be subjected to the normal and surtaxes imposed by sections 11 and 12 in arriving at the net income for the purpose of applying the 15 percent limitation prescribed by section 23 (n) on the deduction for charitable contributions. In the case at bar this method wiped out all of the taxpayer's income and showed a net loss of $59,958.46; however, for the purpose of the tax, plaintiff had a *net income* of $94,963.52. This method of determining whether the taxpayer is entitled to a deduction for charitable contributions is theoretical and we think it is not authorized by either the language or the intent of the statute. In the enactment of the provisions with reference to capital net gains and capital net losses Congress did not in any way evidence

a purpose to take away or to limit the right of an individual taxpayer to deduct from net income, subject to tax, his charitable contributions in an amount not exceeding 15 percent of such net income. It would require language so clear as to leave room for no other reasonable construction in order to justify the belief that Congress intended that a loss which it specifically excluded and denied to a taxpayer as a deduction in determining the net income upon which he is required to pay a tax must, nevertheless, be deducted from such taxable net income for the purpose of determing whether he had a net income from which he could take a deduction for charitable contributions.

The capital net loss provisions were originally enacted in the Revenue Act of 1924. A capital net loss is the net loss sustained by a taxpayer in the sale of investment property held for more than two years. The statute provides two methods of computing the tax to be collected in the case of a taxpayer who has sustained a capital net loss and the method which will produce the higher tax must be followed under the plain mandate of the statute. Section 101 (b) provides that the tax shall first be computed upon the basis of ordinary net income, which is determined without allowing any deduction in respect of the capital net loss, at the rates prescribed in other sections of the act and that the total tax due by the taxpayer shall be the tax thus determined less a credit against such tax of 12½ percent of the capital net loss. That section further provides that in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of that section. Under the first method of computing the net income and the tax, the capital net loss is *not allowed* as a deduction, but is used as a base for calculating the credit against the total tax. Under the second method, if it produces a higher tax, the capital net loss is, by the statute, made a *permissible deduction* in determining net income, and the tax upon such net income is computed at the rate specified in sections 11 and 12, and no credit against the resulting tax is made. This is the only instance where the statute authorizes a deduction of the capital net loss in determining taxable net income. In either case the

taxpayer is taxed upon his "net income" as defined by the statute. Under the first method, in a case like the one under consideration, the Commissioner computes a tax upon a statutory *net income* but denies the taxpayer any deduction for charitable contributions. Under the second method the Commissioner likewise determines and computes the tax at the rates specified in the statute upon the statutory *net income* and allows the full deduction for charitable contributions to the extent of the limitation specified in section 23 (n). We can find no justification in the language of the statute for the denial of a deduction for charitable contributions under the first method. The statute is not ambiguous. "Net income" is a statutory concept and in both of the cases just mentioned the taxes are computed upon *net income* and it seems clear to us that in section 23 (n), relating to charitable contributions, the Congress did not use the term "net income" in any different sense. Deductions may be granted or withheld by Congress at its pleasure and when the statute denies to a taxpayer the right to take a certain deduction in determining his net income, such deduction may not be made in any case unless it is clearly authorized by the language of the statute or shown to be within the manifest intention of Congress, neither of which do we find in the present case. Moreover, Congress has specified the only instance in which a capital net loss is a permissible deduction in determining the statutory net income subject to tax and no other instance when such a loss may be deducted may be read into the statute by administrative or judicial construction, or upon any theory of supposed consistency. Consistency in theory is not necessary in matters of taxation and is not always found in taxing statutes. As was pointed out by the court in *Helvering* v. *Bliss*, 293 U. S. 144, a "capital net gain" is simply a part of the "net income" as defined by the statute and the mere fact that Congress chose to tax that part of the net income at a fixed rate of 12½ percent, regardless of the amount thereof, made it none the less a part of the "net income"—that is, the base for the calculation of the tax to be paid by the taxpayer as contemplated and intended by the term "net income" as used in section 23 (n). By the same process of reasoning we think it is clear that

since "net income" is always a statutory concept, a capital net loss, which is not a permissible or allowable deduction under section 23 in determining the net income of a taxpayer for the purpose of the tax imposed by sections 11 and 12—that is, the base for the calculation of the tax before deducting charitable contributions—may not be deducted from such net income for the purpose of denying altogether or materially reducing the deduction which Congress since October 3, 1917, has consistently given to individual taxpayers for charitable contributions. Any other construction would, we think, disregard legislative history of persuasive force with reference to the deduction of charitable contributions; it would adopt a distorted rather than the ordinary meaning of the language of the several provisions of section 101, and would tend to defeat rather than further the purpose of the act with reference to charitable contributions. In *Howard Heinz* v. *Commissioner*, 34 B. T. A. 885, the Board, at page 900, stated as follows:

> In the instant case it will be seen that the capital loss provision indirectly works to the petitioner's advantage, when read in conjunction with the provision for deducting charitable contributions, for while the former section [net loss section 101] limits the amount of losses to the petitioner's disadvantage, it increases the amount of his total net income, and to that extent, therefore, enlarges the charitable deduction which is measured by a percentage of that income. The ameliorative purpose of the two sections is therefore retained here. And there is nothing in the *Bliss* decision which warrants going farther.

The exclusion of the capital net loss as required by the statute without question serves to increase the amount of a taxpayer's total net income and, likewise, to increase his tax and to enlarge the base for the calculation of the deduction for charitable contributions which is limited to 15 percent of that net income. Charitable contributions to the extent of 15 percent of the net income subject to tax have been allowed by Congress as deductions from taxable net income—the base for the calculation of the tax—in every revenue act since the Act of 1916. If there were doubt as

to the connotation of the term "net income," as used in section 23 (n), or another meaning other than net income subject to the tax imposed by sections 11 and 12 might be adopted, "the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer." *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552, 561. Beginning with section 214 (a) (10) of the Revenue Act of 1924 charitable contributions have been allowed as deductions from net income without limitation where a taxpayer for the current taxable year, and in each of the preceding ten years has contributed to charity over 90 percent of his net income in each such year (after deducting income, war profits, and excess profits taxes paid). See section 214 (a) (10), Revenue Acts of 1924 (43 Stat. 253) and 1926 (44 Stat. 66), and section 120 of the Acts of 1928 (45 Stat. 791, 828) and 1932 (47 Stat. 169). In such case it is obvious that on no theory could a capital net loss be deducted from ordinary net income for the purpose of reducing or entirely denying the deduction for the charitable contribution expressly given by the statute, and the defendant does not contend that under such circumstances the capital net loss could be deducted. Under the defendant's theory, a taxpayer who contributes over 90 percent of his annual net income to charity over a period of ten years is entitled, when he has a capital net loss, to deduct the whole amount of his contributions from ordinary net income undiminished by such loss, but a taxpayer who has contributed less than 90 percent of his net income to charity over a period of years and in the taxable year contributes a substantial amount, or even more than 90 percent to charity, may not, where the 15 percent limitation applies, obtain any deduction for such charitable contributions where the capital net loss exceeds the taxable net income, although such taxpayer is required by the statute to pay a substantial tax upon a definite statutory net income. It seems manifest that Congress did not intend such an unfair result, nor do we think it is required by the language of the statute. Charitable contributions are "ordinary deductions" under section 23 and in the case of a taxpayer having a capital net loss his *net income* as defined by section 23 (n) for the

purpose of computing the allowable deduction for charitable contributions is "ordinary net income," which is the base for the calculation of the tax.

The fact that Congress provided in section 101 (b) that 12½ percent of a capital net loss should constitute a credit against the total tax computed upon the taxpayer's net income does not require the deduction in addition of the entire capital net loss from taxable net income for the purpose of measuring the amount upon which the deduction for charitable contributions shall be calculated. An amount so determined is nowhere mentioned or defined in the statute and it can never constitute the base for the calculation of the tax, except when the deduction of the capital net loss in its entirety from ordinary net income produces a greater tax. In such case the difference between the ordinary net income and the capital net loss is the statutory "net income"—the base for the calculation of the tax—from which the deduction of the charitable contributions within the limit specified is to be made. Had Congress intended that this method be followed in every instance in determining the net income to be used as the base for the calculation of the 15 percent limitation for charitable contributions, we think it would have used language sufficiently clear not to be misunderstood. In the Revenue Act of 1924 Congress enacted new provisions with reference to charitable contributions and capital net losses. With respect to the former it enlarged the deduction so as to encourage such contributions, and with respect to the latter it limited the right of the taxpayer to deduct a capital net loss. We think, also, that if Congress had intended that the net income should be taxed at the rates specified in sections 11 and 12, but reduced in amount for the purpose of calculation of the 15 percent limitation on the deduction of charitable contributions because a credit of 12½ percent of the capital net loss was allowed as a credit against the resultant tax, some provision for such reduction would have been made. When a taxpayer has a capital net loss his statutory net income is his "ordinary net income" and this is made clear by section 101 (c) (7). The Board of Tax Appeals so held in *Elkins v. Commissioner*, 24 B. T. A. 572 (decided November 3,

1931), and *Livingood, Executor of Emery*, v. *Commissioner*, 25 B. T. A. 585 (decided February 23, 1932). In our opinion those decisions were correct. In *Helvering* v. *Bliss*, *supra*, the Supreme Court said:

> If the meaning of the act were doubtful, we should still reach the same conclusion. The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed.

The force of that statement when applied to the instant case is apparent. The liberalization of the law in the taxpayer's favor by permitting him to deduct charitable contributions to the extent of 15 percent of his net income subject to tax as determined before any allowance for charitable contributions is not to be narrowly construed. We have had occasion heretofore to point out that the beneficent provisions of remedial statutes are not to be thwarted by nice technicalities not within the minds of the legislators. *Siegel* v. *United States*, 84 C. Cls. 551. Under these circumstances we should not depart from the plain and ordinary meaning of section 23 (n) in an effort to bring about a uniformity by deducting capital net losses from statutory net income if capital net gains are to be treated as a part of the statutory net income, which uniformity it is claimed Congress intended but failed to express. We are of opinion that the term "net income," as used in section 23 (n), was used in the same sense in which it has always been used in other statutes since the Revenue Act of 1916, and, as we shall hereinafter attempt to show, we think this interpretation is consistent with all the provisions of section 101.

The Revenue Act of October 3, 1917 (H. R. 4280), ch. 63, (40 Stat. 300), as it was passed by the House of Representatives, contained no provision with reference to deductions for charitable contributions. The bill was amended by the Senate and "Title XII—Income Tax Amendments" was inserted and in section 1201 (2) thereof, section 5 of the Revenue Act of 1916 was amended so as to provide for a deduction by individuals of charitable contributions to the extent of "15 percent of the taxpayer's *taxable* net income

as computed without the benefit of this paragraph." (Italics supplied.) See Conference Report on the Revenue Act of 1917, Senate Document 115, 65th Congress, First Session, p. 2. In section 214 (a) (11) of the Revenue Act of 1918 approved February 24, 1919, 40 Stat. 1057, 1066–1068, relating to deductions for charitable contributions, and corresponding sections of all subsequent revenue acts, the word "taxable," as used in section 1201, *supra*, of the Revenue Act of 1917 was left out for the obvious reason, it seems to us, that the word was surplusage and that "the taxpayer's net income," as used in such later acts, meant and was intended to mean "the taxpayer's taxable net income." The provision for the deduction of charitable contributions was consistently so construed until the capital net loss provisions of section 208 of the Revenue Act of 1924 were enacted. In our opinion section 208, which denied a deduction of a capital net loss in determining the taxpayer's taxable net income, did not and was not intended to change the original meaning of the words "the taxpayer's net income" as used in the section relating to the deduction for charitable contributions.

There is nothing in the history of the legislation denying the deduction of a capital net loss in the determination of taxable net income showing any intent on the part of Congress to reduce or take away the deduction for charitable contributions. The history of the legislation with reference to deductions for charitable contributions clearly shows that Congress over a long period of years has intended that this deduction should be allowed whenever an individual taxpayer has a statutory net income upon which a tax is to be computed and collected, and that such deduction is to be taken from that net income. The capital net loss provision was enacted by reason of the practice of many taxpayers when they had a large ordinary net income to sell investment property on which a loss instead of a gain would be realized with the view to reducing taxes by offsetting such capital net losses against gross income from all sources. As a result the Government was being deprived of revenue because capital net gains were taxable only at 12½ percent regardless of the amount and capital

net losses were deductible prior to 1924 from ordinary gross income in their entirety. Neither the statutes nor the committee reports contain any suggestion that the deduction for charitable contributions was to be altered or disturbed through the medium of the capital net loss provision. The declared purpose of the Congress in permitting a deduction for charitable contributions over a long period of years was to encourage such donations. Such deduction for donations necessarily served to reduce taxable income and, hence, to reduce taxes prior to the enactment of the net loss provisions, but such deductions were allowed from motives of public policy.

For the reasons hereinbefore stated, we are unable to concur in the decisions in *Lockhart* v. *Commissioner*, 32 B. T. A. 732, (decided June 10, 1935), affirmed (C. C. A., 3rd Circ.), 89 Fed. (2d) 143; *Avery* v. *Commissioner*, 32 B. T. A. 948, (decided July 16, 1935), affirmed (C. C. A., 7th Circ.), 84 Fed. (2d) 905; *Heinz* v. *Commissioner*, (decided August 7, 1936), affirmed (C. C. A., 3rd Circ.), 94 Fed. (2d) 832; *Nippert, et al.* v. *Commissioner*, 32 B. T. A. 892; *Hill* v. *Commissioner*, 33 B. T. A. 891; *Zimmermann, et al.* v. *Commissioner*, 36 B. T. A. 279; *Wollman* v. *Commissioner*, and *Johnston* v. *Commissioner*, decided by memorandum opinions in February 1936 and April 1937, respectively, all on the authority of *Lockhart* v. *Commissioner*, *supra*, and G. C. M. 14030, XIII–2 C. B. 135. The facts stipulated in the *Heinz* and *Lockhart cases* are confusing. In the former the taxpayer stipulated that his *taxable net income* for 1931, as reflected in the deficiency notice, was $186,879.09, when, as a matter of fact, his true taxable net income was his "ordinary net income" of $375,844.65 and a like stipulation of fact was made with reference to the year 1932. In the latter case it was stipulated that the taxable net income for 1929 was $911,599.10, whereas the true taxable net income was the ordinary net income of $966,467.20. It seems clear that the Commissioner cannot treat a capital net loss as a part of the *taxable net income*. All of the decisions mentioned, beginning with the case of *Lockhart* v. *Commissioner*, *supra*, held that a capital net loss, although not a permissible de-

duction under section 23 for the purpose of determining net income subject to the tax imposed by sections 11 and 12, might, nevertheless, be deducted from such net income for the purpose of determining the amount on which the 15 percent limitation for charitable contributions was to be computed on the ground that this conclusion was required by the opinion of the Supreme Court in *Helvering* v. *Bliss*, *supra*. In the *Lockhart* case the Board of Tax Appeals and the Circuit Court of Appeals for the 3rd Circuit appear to have attached considerable importance to footnote 2 to the opinion of the Supreme Court in the *Bliss case*, p. 146; but that footnote was not inserted as a part of the opinion of the court to the effect that a capital net gain was a part of the statutory net income—the base for the calculation of the tax—nor did it follow any reference in the opinion of the court to the capital net loss provisions. This footnote followed the statement of facts involved in the case before the court, and specifically the concluding sentence in such statement that "the Board of Tax Appeals sustained the Commissioner [holding that a capital net gain was not a part of the net income within the meaning of section (23 (n)], but the Circuit Court of Appeals, by a divided court, reversed the Board." We do not think that the reference in that footnote to the decisions of the Board in *Elkins* v. *Commissioner*, *supra*, and *Livingood* v. *Commissioner*, *supra*, was either a holding by the court that those decisions, which involved a capital net loss, were erroneous or that they had been overruled by the Board in *Straus* v. *Commissioner*, 27 B. T. A. 1116. In the *Straus case* the Board specifically stated that it was not passing upon the question whether its decision in that case affected in any way its previous holdings in the *Elkins* and *Livingood cases*.

The Board and the Circuit Court of Appeals in the *Lockhart* and *Heinz cases* held that under the decision of the Supreme Court in the *Bliss case* net income as defined by section 21, and computed under sections 22 and 23, not only includes capital gains, but is to be determined after the deduction of capital losses, since the latter are losses deductible from gross income under section 23 (e). The reasons which we have hereinbefore mentioned lead us to the

conclusion that capital net losses are not deductible under section 23 (e) for any purpose, except when the allowance of a capital net loss as an ordinary deduction would produce a higher tax than its exclusion as a deduction and an allowance of 12½ percent against the resulting tax upon net income otherwise determined. *Piper* v. *Willcuts*, 64 Fed. (2) 813; *Hoffman* v. *Commissioner*, 71 Fed. (2) 929. The fact that under the broad language of section 23 (e) a capital net loss would be deductible if it were not excluded, does not, in our opinion, require such capital net loss to be deducted from ordinary gross income to determine whether a taxpayer has a statutory *net income* for the purpose of deductions for charitable contributions. *Cf. Massachusetts Mutual Life Insurance Co.* v. *United States*, 75 C. Cls., 117, 126, affirmed 288 U. S., 269. Compare section 23 (r), Revenue Act of 1932. Net losses on stocks, bonds, or other securities not capital assets were denied as deductions in the taxable year in which sustained for the same reason that capital net losses were denied as deductions, namely, to prevent a taxpayer from avoiding the normal and surtaxes by selling stocks and bonds on which he could sustain a loss in a taxable year in which he had a large income from other sources.

The Circuit Court of Appeals for the Second Circuit in *Bliss* v. *Commissioner*, 68 Fed. (2d) 890, 892, which involved capital net gains for 1928 and 1929, stated, in holding that a capital net gain was a part of the net income upon which the deduction for charitable contributions should be computed, that a capital net loss would be deductible without exception from ordinary net income in determining the taxpayer's net income for the purpose of deduction for charitable contributions; and in *White* v. *Atkins*, 69 Fed. (2d) 960, 963, which also involved a capital net gain for 1929, the Circuit Court of Appeals for the First Circuit held without exception that a capital net loss was deductible from ordinary net income in determining the taxpayer's net income for the purpose of deduction for charitable contributions and expressly overruled the decisions of the Board of Tax Appeals in *Elkins* v. *Commissioner*, *supra*, and *Livingood* v. *Commissioner*, *supra*. The *Bliss* and *White*

cases, *supra*, did not involve a capital net loss and, for the reasons hereinbefore stated, we are unable to concur in the views expressed as to the proper method to be employed in determining the taxpayer's net income for the purpose of deduction for charitable contributions where such taxpayer had a capital net loss for the taxable year.

We do not interpret the opinion of the Supreme Court in the *Bliss case* as it has been interpreted by the Board of Tax Appeals and the Circuit Courts of Appeals in the cases hereinbefore cited. The question of whether a capital net loss should be deducted from the taxpayer's taxable net income in fixing a net income different from the taxable net income for the purpose of calculating the amount of the allowable deduction for charitable contributions does not appear to have been considered or decided by the court. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Anderson, et al.*, 269 U. S. 422, 442; *United States* v. *Mitchell*, 271 U. S. 9, 14. However, we think the decision in *Helvering* v. *Bliss*, *supra*, lends greater support to the position of the plaintiff in this case than to that of the defendant. The court in holding that a "capital net gain" taxed at the special rate of 12½ percent was a part of the "net income" within the meaning of that term, as used in section 23 (n), said, at page 147:

> The scheme of all the Revenue Acts since that of 1916 has been to sweep all income of every sort, including capital gains, into what is denominated gross income and to authorize certain deductions therefrom in order to arrive at net income—*the base for calculation of the tax*. In the Act of October 3, 1917, Congress, in order to encourage gifts to religious, educational, and other charitable objects, granted the privilege of deducting such gifts from gross income, but limited the total deduction to 15 per cent of the taxpayer's net income, calculated in the first instance without reference to the amount of such contributions. All of the later Acts have contained a like provision. The Acts provide that the taxpayer shall first deduct from gross income the total of all permissible deductions save that for contributions, thus arriving at a provisional net income, and then deduct therefrom his contributions, but in no event to an amount greater than fifteen per cent of the provisional net income. By the last mentioned

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> operation the final net income—*the base for calculation of the tax*—is ascertained. The relevant sections of the Act of 1928 are typical. They are copied in the margin. [Italics supplied.]

It will thus be seen that the court definitely held that charitable contributions were deductible in arriving at the base for the calculation of the tax—the statutory net income. In that way taxable income, to the amount of the deductible contributions, is free from tax, and the beneficent purpose of section 23 (n) is made effective. In the instant case the defendant determined the base for the calculation of the tax to be $94,963.52 but refused to permit plaintiff to take a deduction for contributions in arriving at that base, notwithstanding plaintiff's *final net income* within the language of the court in the *Bliss case* was $94,963.52—the base for the calculation of the tax—and was so employed by the Commissioner of Internal Revenue. The Court, at pages 148–150, further said:

> Commencing with the Revenue Act of 1921 Congress, in order to encourage realization of profits on capital assets, saw fit to relieve gain thus derived of the heavy surtaxes then applicable, and to permit the payment of tax at a flat rate of 12½ per cent on so much of the taxpayer's income as represented the net gain from capital transactions.
>
> The accomplishment of this purpose of applying two rates to *two different kinds of net income* required new provisions as to the base for each rate. Section 101 of the Revenue Act of 1928 prescribes the method to be followed. So far as material it is set forth in the margin. In extending this relief to taxpayers, Congress might have modified the privilege theretofore existing with respect to charitable contributions, by directing that they should be deducted solely from capital net gain or should be apportioned and deducted ratably from ordinary net income and from capital net gain. The Acts, however, evince no such purpose. In the Act of 1928, as will be seen by reference to Sections 21, 22, and 23 (supra note 4), the statutory concept of net income is preserved. These sections are found in part II of title I, which deals with "Computation of Net Income." Section 101, on the other hand, is found under "Supplemental Provisions," and is cap-

tioned "Supplement A—Rates of Tax." *It is obviously directed to the matter of computation of tax on a portion of net income as defined in Section 21. There is nothing novel in such a division of the statutory net income into parts for the purpose of applying different rates of tax*, as witness the provisions fixing the rates on those portions of the entire net income attributable to dividends, earned income, interest on United States obligations, and gains from the sale of mines, and allowing credits for dependents. [Italics supplied.]

The two kinds of net income which existed in the *Bliss case* consisted of (1) "ordinary net income," which was gross income as defined by section 22 other than gains derived from the sale of capital assets less the deductions allowed by section 23, among which was included charitable contributions, but from which was excluded capital deductions and capital net losses, and (2) "capital net gain," which was the balance of the gross income as defined by section 22 in excess of capital deductions and capital losses. In the case at bar we have only one net income, i. e., "ordinary net income." Under the provisions of the statute, including the provisions with reference to capital net gains and capital net losses, if the ordinary deductions allowed by section 23 exceed that part of gross income to be used in computing "ordinary net income," the excess of such ordinary deductions is by express provision of the statute (section 101 (c) (5)) to be carried over and deducted from the capital net gain, and the balance of the capital net gain, if any, is the taxpayer's *statutory net income* for the purpose of the tax. In that case there would be no normal or surtaxes and the tax due would be the capital gains tax of 12½ percent regardless of the amount of the "net income." But when the gross income to be used for the purpose of computing the "ordinary net income" is greater than the "ordinary deductions" allowed by section 23, including charitable contributions, and the capital deductions and capital losses under section 101 exceed that part of the gross income to be used in computing the capital gains, the statute stops without authorizing any carrying over of the capital net loss as a deduction from "ordinary net income" and directs that the tax imposed by sections 11 and 12 be computed upon that net income, except when to

carry over and deduct such capital net loss from ordinary net income a greater normal and surtax, less a 12½ percent credit, would result. From this it seems to us plain enough that under the express provisions of the entire statute a taxpayer, although he has a capital net loss and, also, has an ordinary net income which produces a higher tax under sections 11 and 12 less the credit of 12½ percent capital net loss, is in the same situation so far as a deduction for charitable contributions is concerned as the taxpayer who has no capital gains, capital deductions, or capital losses. As we shall hereinafter show, the statute specifically permits a deduction from capital net gain of the excess of the ordinary deductions over ordinary gross income, while a capital net loss is denied, in a case like the one at bar, as a deduction from ordinary gross or net income.

In the *Bliss case* the court did not decide that if a taxpayer had only one kind of net income and paid a tax on that net income his deduction for contributions was to be reduced or denied altogether as happened in the case at bar. The court simply held that ordinary net income and capital net gains were portions of the *entire net taxable income* and that they were separated for the purpose of applying different rates of tax. A capital net gain was held to be a portion of the net income as defined by section 21. Similarly "ordinary net income" is a portion of the net income as defined by section 21, and, by express provision of the statute, it may not be reduced by a capital net loss. Section 101 (c) (7) provides that "'Ordinary net income' means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions." It will therefore be seen that ordinary net income is "net income" computed in accordance with sections 21, 22, and 23 for the reason that those sections define net income and are a part of "this title" referred to in section 101 (c) (7) which has reference to Title I, Income Tax. In the *Bliss case*, *supra*, the court further said, at page 150:

> The plain requirements of Section 101 are that in ascertaining ordinary net income there shall be excluded from the computation only items of capital gain, capital loss, and capital deductions. Charitable contribu-

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> tions covered by Section 23 (n) obviously are not capital deductions as defined by Section 101 (c) (3), but on the contrary are "ordinary deductions" within the meaning of Section 101 (c) (4).
>
> By the express words of Section 23 (n) charitable contributions are to be deducted to ascertain net income as defined in Section 21; and nothing in Section 101, which prescribes merely a method for segregating a portion of that net income for taxation at a special rate, in any wise alters the right of the taxpayer to take the deduction in accordance with Section 23 (n).

In the first paragraph above, the court pointed out that when section 101 controls the computation of the tax, ordinary net income is ascertained by excluding a capital net gain or capital net loss. The exclusion applies to both. A capital net gain is not included in ordinary net income but it is, nevertheless, net income and is taxed as such. If a capital net gain were included in ordinary net income, section 101 would conflict with sections 11 and 12. It does not necessarily follow from the fact that a capital net gain (although excluded in computing ordinary net income subject to the normal and surtaxes) is a part of the statutory "net income" because it is a gain and is taxed at 12½ percent instead of at the rates specified in sections 11 and 12, that a capital net loss (which is specifically excluded in the determination whether the taxpayer otherwise has a taxable net income) must be deducted from the only taxable statutory net income the taxpayer has for the purpose of reducing or denying altogether the taxpayer's charitable contributions. As hereinabove pointed out, the last clause of section 101 (b) specifies the only instance when a capital net loss may be deducted from ordinary net income. It is to be deducted when such deduction will produce a greater tax than the tax (less the 12½ percent credit) computed upon the ordinary net income less the charitable contributions. The Supreme Court specifically held in the *Bliss* case that charitable contributions are ordinary deductions within the meaning of section 101 (c) (4) and are properly deductible in ascertaining ordinary net income. The word "excluding" appearing in section 101 (c) (7) does not contemplate exclusion of the ordinary deductions for chari-

table contributions. The plain language of section 101 (c) is that ordinary net income, as defined by section 101 (c) (7), as applied to a case involving a capital net gain or a capital net loss, is to be ascertained by the same process. We think Congress did not intend to discriminate between taxpayers having capital net gains or capital net losses in the method to be employed in determining "ordinary net income" for the application of normal and surtaxes as prescribed and imposed by sections 11 and 12. The ordinary deduction for charitable contributions was preserved in both cases. It was specifically pointed out in the *Bliss decision* at page 150 that "nothing in section 101 * * * in any wise alters the right of the taxpayer to take the deduction in accordance with section 23 (n)." The statute requires the deduction for charitable contributions to be taken as a whole from ordinary net income. This applies whether the case is one involving capital net gain or capital net loss. The only instance in which the deduction for charitable contributions is not taken as a whole from "ordinary net income," either under section 23 (n) or section 120, is where there is an excess of ordinary deductions, including the deduction for contributions, over the gross income computed without including capital gains, as was the case in *Straus* v. *Commissioner*, *supra*. In such a case the excess is subtracted in arriving at the capital net gain subject to the 12½ percent tax. Section 101 (c) (5) expressly so provides. See, also, Ways and Means Committee Report on the Revenue Bill of 1924, No. 179, page 19, 68th Congress, 1st Session, which points out that when the ordinary deductions exceed the ordinary gross income, the excess serves to reduce the amount of the capital net gain.

If we read into any of the sections of the statutes directing how net income must be determined an implied condition that a capital net loss must be deducted as an ordinary deduction for the purpose of determining "the taxpayer's net income" upon which he may compute his allowable deduction for charitable contributions, we are forced by the provisions of section 101 to ignore such implied condition when we come to determine the taxpayer's taxable net income for the purpose of normal and surtaxes. If we imply

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such condition in dealing with charitable contributions we violate, it seems to us, the well-established rule against legislation by construction and run counter to the originally expressed and subsequently intended direction of Congress that charitable contributions are to be deducted from "the taxpayer's taxable net income."

Where there is a capital net gain, such gain is a part or all of the taxpayer's statutory net income, but where there is a capital net loss the ordinary net income is the taxpayer's entire statutory net income. Judgment will be entered in favor of plaintiff for $969.79 with interest as provided by law. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, concurs in the result.

OLDS & WHIPPLE, INC. v. THE UNITED STATES

[No. 43748. Decided April 4, 1938]

On Demurrer to Petition

Income tax; suspension of statute of limitations.—The statute of limitations on assessment of any tax finally found to be due in accordance with the opinion and mandate of the Circuit Court of Appeals remains suspended until the decision of the Board of Tax Appeals becomes final and for sixty days thereafter, and then commences to run; the fact that the Commissioner was authorized to assess and collect the deficiencies first determined by the Board, when no bond was made by the taxpayer when it appealed to the Circuit Court of Appeals, does not, under Section 277 (a) and (b) of the Revenue Act of 1926, as amended by section 504 of the Revenue Act of 1928, affect the statute of limitations.

Same; claims for additional amounts.—The taxpayer having on April 2, 1934, paid the full amount of the deficiencies set forth by the Commissioner in the statutory sixty day deficiency notices and in accordance with the assessment of the Commissioner on March 9, 1934, the suspension of the period of limitation applicable to 1927 and 1929 did not cease; no claim having

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been made by the Commissioner for additional deficiencies or additional amounts for those years prior to the first hearing before the Board on May 15, 1933, and no additional letter having been sent by the Commissioner within the unused limitation period running from the assessment made March 9, 1934 or from the date of payment, April 2, 1934, the determination by the Board or assessment by the Commissioner of any further tax on March 27, 1936, over and above the amounts claimed in the original deficiency notice, was not barred, and the credit of the allowed overpayment for 1928 against the additional deficiencies for 1927 and 1929 was legal; it was not necessary for the commissioner to make claim before the Board or the Circuit Court of Appeals for additional amounts in order to continue the suspension of the statute of limitations.

Same; finality of decision by Board of Tax Appeals.—Where a decision of the Board of Tax Appeals is appealed and reversed, and under the mandate of the appellate court, the Board is directed to take further proceedings to carry out the decision of the appellate court, it is held that the only means available to contest the correctness of a final decision of the Board entered pursuant to the opinion and mandate, or the authority of the Board to make such decision, is by appropriate proceeding in the appellate court.

Same; specific issues raised by taxpayer.—Where a taxpayer raises before the Board certain specific issues with reference to the year or years involved, and a decision of those issues in his favor produces a larger deficiency for such year or years than that set forth in the deficiency notices of the Commissioner, it is held that no specific claim by the Commissioner is required by the statutes in order to give the Board authority to enter a decision for the correct deficiency; the taxpayer itself having by raising the issues conferred upon the Board jurisdiction to enter a decision or decisions.

Same; limitations on Court of Appeals.—Where a case decided by the Board of Tax Appeals is appealed to and reversed by the Circuit Court of Appeals, such court is not limited by the provisions of sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928 in the decision of the issues raised on appeal by the taxpayer, and if justice requires that issues raised by the taxpayer on appeal be decided in his favor, and such decision results in deficiencies in excess of those originally determined by the Board, it is held that the taxpayer is in no position to complain.

Same; computations of Commissioner held to be correct where not disputed; submission of issues under mandate held to be a rehearing.—Where upon the mandate of the Circuit Court of Appeals, the Board restored the proceedings to its docket,

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and in its order directed the parties to submit computations of the plaintiff's tax liability for the years 1927, 1928 and 1929; and thereafter the Commissioner filed a recomputation of the tax for the years involved, it is assumed, since it is not disputed, that the Commissioner's recomputation complied with the mandate of the Court, and that it was correct; the filing of the computation and the submission of the cases thereon to the Board are held to have constituted a rehearing within the meaning of Sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928; and the Commissioner was therefore enabled at such time to make claim for increased deficiencies; and the judgments of the Board are therefore held to be in all respects legal and proper.

Same; basic period of limitation suspended for a definite time.—Under section 277 (b) of the Revenue Act of 1926 as amended and section 277 of the Revenue Act of 1928, which are identical, it is held that the intent of Congress was to provide that the stated basic period of limitation upon assessment shall be suspended for a definite and specific period, easily calculable; for the period between the date of mailing the deficiency notice until the date when the Commissioner may assess the tax, and, in any event, if a proceeding is placed on the docket of the Board, until the decision of the Board becomes final and for sixty days thereafter.

Same; account stated; credit of overpayment mandatory.—Where the overpayment for 1928 determined by the Board and allowed by the Commissioner under a timely claim for refund was credited by the Commissioner against the final deficiencies determined by the Board for 1929 and the balance of such overpayment, plus certain other items, was credited in partial satisfaction of the final deficiency of $12,234.67 determined by the Board for 1927; leaving a balance of approximately $2,443.84 of the final deficiency in tax determined for 1927 still due from taxpayer, it is held that there was no account stated as evidenced by the certificate of over assessment for 1928 mailed to plaintiff on April 13, 1936; where there were other taxes due and owing by the taxpayer for 1927 and 1928, as the Court has held there were, the credit to such taxes of the overpayment for 1928 was mandatory.

Mr. Warren W. Grimes for the plaintiff.

Mr. John A. Rees, with whom was Mr. Assistant Attorney General *James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff here seeks to recover an overpayment of $7,047.30 determined by the Board of Tax Appeals and allowed by the Commissioner for 1928. Upon the facts alleged in the petition it appears that plaintiff and the W. S. Pinney & Company, also a Connecticut corporation, each filed separate tax returns for 1925, and for the years 1926 to 1929, inclusive, plaintiff filed consolidated returns for itself and the other corporation claiming therein that the two corporations were affiliated, and certain losses, which will be hereinafter mentioned, were claimed as deductions.

In the separate returns filed for 1925 plaintiff's return showed a net income of $67,625.03 and the Pinney Company reported a net loss of $238,009.36. For 1926, in the affiliated return, plaintiff used the Pinney Company's $151,772.46 current loss as an offset against plaintiff's income of $119,802 resulting in a claimed consolidated net loss of $31,970.46. No tax was shown to be due upon that return and none was paid. The Commissioner of Internal Revenue denied affiliation for 1926 but held that the stock of the Pinney Company, which was owned by plaintiff and which had cost $210,500, became worthless in 1926. The Commissioner therefore proceeded to offset that loss against plaintiff's separate income of $67,625.03 for 1926 resulting in no tax being due for that year.

In the 1927 consolidated return plaintiff claimed the right to carry over and deduct the consolidated net loss of $31,-970.46 shown in the consolidated return for 1926. The Commissioner allowed affiliation for 1927 but disallowed the deduction of the consolidated net loss attempted to be carried over from 1926 on the ground that the corporations were not affiliated for that year and, by a statutory deficiency notice mailed February 5, 1931, determined and asserted a deficiency against plaintiff of $4,339.60 for 1927.

For 1928 a consolidated return was filed and plaintiff at that time claimed as a loss the cost to it of the stock of the Pinney Company as a deduction for 1928, on the ground that the stock became worthless in that year. The Commissioner disallowed the deduction on the ground that the loss

of $210,500 on the stock of the Pinney Company had been sustained in 1926 and he had so ruled. In a statutory deficiency notice mailed February 5, 1931, the Commissioner determined and asserted a deficiency against plaintiff of $18,065 for 1928.

In the consolidated return for 1929 plaintiff claimed as a deduction for that year $100,372.15, representing the unabsorbed loss which it had claimed in the consolidated return for 1928 on the alleged worthlessness in 1928 of the stock of the Pinney Company. By disregarding the carrying over and deduction in 1929 of such claimed loss in 1928 of $100,372.15, plaintiff's income for 1929 was $113,820.29 and the Pinney Company's income was $6,243. The return as filed showed a tax of $1,178.70 and that amount was paid pursuant to the consolidated return as filed in which the unabsorbed portion of the stock loss claimed to have occurred in 1928 was deducted. The Commissioner denied the deduction of the $100,372.15 above mentioned for 1929 for the same reason that he denied a deduction on account of the same loss claimed for 1928, namely, that the loss on the stock of the Pinney Company occurred in 1926. The Commissioner by a statutory deficiency notice mailed November 16, 1931, determined and asserted a deficiency for 1929 of $11,698.28.

Within sixty days after the mailing of the deficiency notice of February 5, 1931, with reference to the years 1927 and 1928, plaintiff filed a petition with the United States Board of Tax Appeals for the redetermination of the deficiencies for those years, and within sixty days after mailing of the deficiency notice of November 16, 1931, it instituted a proceeding before the Board of Tax Appeals for a like purpose with respect to the year 1929. In both of these proceedings plaintiff contended (1) that it and the Pinney Company were affiliated for 1926 and that the Commissioner had erred in holding otherwise, and (2) that the loss to plaintiff of the cost to it of the stock of the Pinney Company occurred and was sustained in 1928 rather than in 1926, as determined by the Commissioner. In an answer filed to the plaintiff's petitions in the proceedings instituted before the Board of Tax Appeals, the Commissioner denied both con-

tentions made by plaintiff. In that answer no new issues were raised by the Commissioner and no additional deficiencies, additional amounts, or additions to the tax were claimed by the Commissioner at or before the trial of the cases before the Board on May 15, 1933, or before the first decisions of the Board in the two proceedings were entered on December 14, 1933. On the last-mentioned date the Board, having heard the case upon the issues raised, rendered a memorandum opinion sustaining the determinations of the Commissioner as to both issues raised in the petitions and entered its decisions approving the deficiencies determined by the Commissioner in the amounts of $4,339.60 for 1927, $18,065 for 1928, and $11,698.28 for 1929.

Thereafter plaintiff perfected an appeal from the decisions of the Board to the United States Circuit Court of Appeals for the Second Circuit under sections 1001 (a) and 1002 (a) of the Revenue Act of 1926. No bond to stay assessment and collection of the deficiencies as determined by the Board on December 14, 1933, was made and filed by plaintiff under section 1001 (c). By reason of no bond for the payment of the deficiencies as determined by the Board having been filed, the Commissioner in accordance with the provisions of section 1001 (c) proceeded to assess such deficiencies on March 9, 1934, and they were paid by plaintiff on April 2, 1934, together with interest of $1,556.25 for 1927, $5,394.51 for 1928, and $2,791.40 for 1929.

Thereafter, on February 4, 1935, the Circuit Court of Appeals for the Second Circuit published its opinion sustaining both contentions made by plaintiff before the Board of Tax Appeals and before the Circuit Court of Appeals, namely, that it was affiliated with the Pinney Company for the year 1926 and that the loss on the stock of the Pinney Company occurred and was sustained in 1928, and that the unabsorbed portion of such loss as a deduction from plaintiff's income for 1928 was a proper deduction from its income for 1929. The opinion of the Circuit Court of Appeals therefore reversed the decisions of the Board for the three years 1927, 1928, and 1929. The opinion of the court is reported in 75 Fed. (2d) 272–275.

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On February 28, 1935, subsequent to the decision of the Circuit Court of Appeals, plaintiff filed a claim for refund for 1928 of $23,582.91 with interest from April 2, 1934, on the ground that under the opinion of the Circuit Court of Appeals an overpayment would result for 1928 by reason of the payment of the deficiency of $18,065 for 1928 on April 2, 1934. In the subsequent proceeding before the Board of Tax Appeals, which will be hereinafter referred to in more detail, the Board carried out the opinion of the Circuit Court of Appeals pursuant to the mandate of that court duly filed with the Board. No petition was made to the Supreme Court for a writ of certiorari to the Circuit Court of Appeals.

The mandate of the Circuit Court of Appeals dated February 20, 1935, to the Board of Tax Appeals was, so far as material here, as follows:

> And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-four, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel: ON CONSIDERATION WHEREOF, it is hereby Ordered, Adjudged, and Decreed That the order of said Board of Tax Appeals be and it hereby is reversed. You, therefore, are hereby commanded that such further proceeding be had in said cause, in accordance with the decision of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

On February 27, 1935, the Board entered an order in both proceedings, No. 53529, relating to the years 1927 and 1928, and No. 60712, relating to the year 1929, as follows:

> Pursuant to mandate of the United States Circuit Court of Appeals for the Second Circuit, filed with the Board in the above-entitled proceedings February 21, 1935, reversing the decisions of the Board, it is
>
> ORDERED, that these proceedings be placed upon the Day Calendar of March 27, 1935, for final decisions in accordance with the views expressed in the opinion of the United States Circuit Court of Appeals for the Second Circuit; the parties to submit on or before March 24, 1935, computations of the petitioner's tax for the years 1927, 1928, and 1929.

Pursuant to the mandate of the Court and the order of the Board of February 27, 1935, the Commissioner on April 19, 1935, filed with the Board a recomputation of the tax for the three years involved in accordance with the opinion of the Circuit Court of Appeals, and, on April 29, 1935, after service upon it of a copy of the Commissioner's recomputation, plaintiff filed an alternative computation. Thereafter the proceedings were taken under submission by the Board upon the recomputations filed and on November 20, 1935, the Board entered a judgment for 1927 and 1928 and a judgment for 1929, which judgments were in accordance with the opinion and the mandate of the Circuit Court of Appeals. The judgment for 1927 was for a deficiency of $12,234.67 in excess of the deficiency of $4,338.60 originally determined by the Commissioner, approved by the Board, and paid by plaintiff April 2, 1934, as hereinbefore mentioned, and for an overpayment for 1928 of $7,047.30, of which $5,394.51 represented an overpayment of interest and the balance an overpayment of tax upon the assessment theretofore made by the Commissioner on March 9, 1934. The judgment of the Board for 1927 and 1928 was as follows:

DECISION PURSUANT TO MANDATE

On December 14, 1933, decision of the Board was entered in the above entitled proceeding. On February 20, 1935, the Circuit Court of Appeals for the Second Circuit reversed the decision of the Board and remanded the case. On April 19, 1935, pursuant to Order of the Board the respondent filed his proposed recomputation of tax and on April 29, 1935, petitioner filed an alternative computation. On consideration of which proposed recomputations, it is

ORDERED and DECIDED: That there is a deficiency in tax for the year 1927 in the amount of $12,234.67; and an overpayment for the year 1928 in the amount of $7,047.30.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Entered Nov. 20, 1935.

On the same date, namely, November 20, 1935, the Board entered a judgment for 1929 which was in all respects the

same as the judgment for 1927 and 1928, except that the amount of judgments was a deficiency of $330.01, being the deficiency due under the decision of the Circuit Court of Appeals in excess of the deficiency of $11,698.28 theretofore determined by the Commissioner and approved by the Board, and paid April 2, 1934, pursuant to the assessment of March 9, 1934.

The net result of the opinion of the Circuit Court of Appeals sustaining the contentions made by plaintiff before the Board and the Court and reversing the determinations of the Commissioner and the Board of Tax Appeals was that plaintiff owed the Government in respect of its tax liability for the years 1927, 1928, and 1929 a net additional tax of $5,517.38 after deducting the excess payment made April 2, 1934, with respect to the year 1928. No appeal was taken by plaintiff under section 1005 (a) (c) of the Revenue Act of 1926 from the final decision of the Board entered November 20, 1935. Thereafter the Commissioner on April 10, 1936, allowed the overpayment of $7,047.30 determined by the Board and also an overpayment of interest of $2,104.44 as he was required to do by section 322 (d) of the Revenue Act of 1928, and, at the same time, credited such overpayment of tax and interest for 1928, totaling $9,151.74, with interest thereon of $1,088.55—first, against the additional deficiency of $330.01 (and interest of $119.45 thereon), for 1929 as set forth in the decision of the Board entered November 20, 1935, and the balance of such overpayment and interest of $1,088.55 thereon against the additional tax of $12,234.67 for 1927 set forth in the decision of the Board of November 20, 1935. The additional deficiencies of $12,234.67 for 1927 and $330.01 for 1929 adjudged by the Board to be due in its decisions entered November 20, 1935, as aforesaid, were assessed by the Commissioner on March 27, 1936. After the credits mentioned, there remained a balance due on the 1927 deficiency assessment of March 27, 1936, of approximately $2,443.84 and interest, for which notice and demand for payment was made, but neither the amount mentioned nor interest thereon has been paid. Upon the attempt by the Collector of Internal Revenue for the District of Connecticut to collect the balance for 1927

pursuant to the assessment by the Commissioner, in accordance with the decision of the Board, plaintiff instituted an injunction proceeding in the United States District Court for Connecticut under section 274 (a) of the Revenue Act of 1926 in *Olds & Whipple* v. *Smith, Collector*, Equity #2671, and an injunction was issued against the collection January 28, 1938.

On April 13, 1936, the Commissioner mailed to plaintiff a certificate of overassessment showing the allowance of the overpayment of $7,047.30 and interest thereon of $2,104.44, totaling $9,151.74 for 1928, and showing also, the credit of the last-mentioned amount against the additional taxes and interest determined by the Board and assessed for 1929 and 1927, as hereinbefore stated. This certificate was received by the plaintiff in due course and a true copy thereof is annexed to the petition herein as Exhibit "B", and is made a part hereof by reference.

The defendant demurs to the petition on the ground that the facts alleged are not sufficient to constitute a cause of action upon which the plaintiff is entitled to recover the overpayment for 1928 and that the petition does not allege facts sufficient to constitute a cause of action within the jurisdiction of this court. The suit here is for the recovery of the overpayment of $7,047.30 with interest, determined by the Board for 1928 pursuant to the opinion and mandate of the Circuit Court of Appeals and duly allowed by the Commissioner of Internal Revenue. Plaintiff's petition alleges five separate causes of action, the first four being under R. S. 3226 as amended and based upon the statute of limitation on assessment and the jurisdiction and powers of the Board of Tax Appeals, and the fifth being under Section 145 of the Judicial Code and based upon an alleged account stated with respect to the overpayment for 1928.

In support of the first cause of action, plaintiff contends (1) that any deficiency for 1927 or 1929 was barred by the provisions of section 277 (a) and (b) of the Revenue Act of 1926 and sections 275 (a) and 277 of the Revenue Act of 1928 when the assessment was made by the Commissioner, March 27, 1936, and that, likewise, the crediting of an al-

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lowed overpayment for 1928 against a barred deficiency was prohibited by law; (2) that thereupon, by virtue of the provisions of section 507 of the Revenue Act of 1928, the Commissioner was required to refund the entire amount of the allowed overpayment of $7,047.30 for 1928, with interest. We think it is clear that the additional deficiencies determined by the Board for 1927 and 1929 in decisions entered November 20, 1935, were timely assessed on March 27, 1936, under section 277 (a) (b) of the Revenue Act of 1926 as amended by section 504 of the Revenue Act of 1928 applicable to the year 1927 and under sections 275 and 277 of the Revenue Act of 1928 applicable to the year 1929. It is urged by plaintiff (1) that subdivision (b) of section 277 is inapplicable where no bond is filed for the tax when an appeal is taken from the decision of the Board and that under section 1001 (c) of the 1926 Act the appeal from the Board's decision does not operate to stay assessment and collection of the deficiencies determined by the Board; (2) that inasmuch as no bond was filed to cover the deficiencies first determined by the Board, the statute of limitation was suspended only during the time the Commissioner was prohibited from making the assessment and for sixty days thereafter; and (3) that, even including any unexpired portion of the statute of limitation at the time it became suspended by mailing of a deficiency notice, such limitation it is urged expired July 20, 1934. This contention is based on the proposition that when the Board first entered its decisions and no bond was filed, the statute of limitation against assessment and collection of any tax for the years involved commenced to run when the restriction on the right of the Commissioner to assess and collect was removed, and that such limitation continued to run thereafter and was not again suspended because the Commissioner had not made claim before the Board for any increased deficiency, or an amount of tax in addition to the deficiencies asserted by him in the original deficiency notices and determined by the Board. This contention cannot be sustained for the reason that section 277 (a) and (b) of the 1926 Act, as amended by section 504 of the Revenue Act of 1928, specifically provides that the running of the statute of

limitation provided in subdivision (a) (1) shall be suspended until the decision of the Board becomes final and for sixty days thereafter. Although the taxpayer may pay the tax first determined in a decision entered by the Board and continue to prosecute his appeal, such payment does not start the running of the statute of limitation against the Government until the decision of the Board, where an appeal was taken, is entered under the mandate of the court. Such decision becomes final thirty days after it is entered. The decision of the Board with reference to 1927 and 1929 did not become final until thirty days after its entry pursuant to the opinion and mandate of the Circuit Court of Appeals. The fact that the Commissioner was authorized to assess and collect the deficiencies first determined by the Board, when no bond was made by the taxpayer when it appealed to the Circuit Court of Appeals, does not, in view of the plain terms of the section referred to, affect the statute of limitation. Section 1003 (b) of the Revenue Act of 1928 provides with respect to the review of decisions of the Board of Tax Appeals as follows: "Upon such review, such courts shall have power to affirm, or if the decision of the Board is not in accordance with the law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require." In these circumstances it is made clear by sections 1005 and 277 (a) and (b) of the Revenue Act of 1926 as amended by section 504 of the Revenue Act of 1928, and sections 275 and 277 of the Revenue Act of 1928, that the decision of the Board becomes final thirty days after it is entered in accordance with the mandate of the Circuit Court of Appeals where no petition for certiorari is filed, unless, within that time, either party institutes proceedings to have the decision of the Board corrected. The statute of limitation on assessment of any tax finally found to be due in accordance with the opinion and mandate of the Circuit Court of Appeals, therefore, remains suspended until the decision of the Board becomes final and for sixty days thereafter, and *then* commences to run.

This brings us to the second cause of action alleged in the petition in support of which the plaintiff contends (1)

that when, on April 2, 1934, it paid the full amount of the deficiencies set forth by the Commissioner in the statutory sixty-day deficiency notices and in accordance with the assessment of the Commissioner on March 9, 1934, the suspension of the period of limitation applicable to 1927 and 1929 ceased; (2) that since no claim was made by the Commissioner for additional deficiencies or additional amounts for those years prior to the first hearing before the Board on May 15, 1933, and no additional deficiency letter having been sent by the Commissioner within the unused limitation period running from the assessment made March 9, 1934, or from the date of payment of that assessment April 2, 1934, the determination by the Board or assessment by the Commissioner of any further tax on March 27, 1936, over and above the amounts claimed in the original deficiency notices was barred. Upon this contention it is insisted that the attempted credit of the allowed overpayment for 1928 against the additional deficiencies determined by the Board for 1927 and 1929 on November 20, 1935 was illegal and void.

For the reasons hereinbefore set forth with reference to the first alleged cause of action, the contention in support of the second cause of action must be denied. The suspension of the statute of limitation did not cease either when the Commissioner made the assessment on March 9 or when plaintiff paid the taxes so assessed on April 2, 1934. It was not necessary for the purpose of the statute of limitation on assessment of the correct tax finally determined to be due for the Commissioner to make claim before the Board or the Circuit Court of Appeals for additional amounts in order to continue the suspension of the statute of limitation.

In support of the third alleged cause of action, plaintiff contends (1) that inasmuch as it paid on April 2, 1934, the entire amounts determined and asserted by the Commissioner in his deficiency notices of February 5, 1931, and November 16, 1931, with legal interest and no additional deficiency letters having subsequently been issued as to 1927 and 1929 and no claim for additional deficiencies having been made by the Commissioner under sections 274 (e) of

the Revenue Act of 1926, and 272 (e) of the Revenue Act of 1928 prior to the final hearing by the Board, the Board of Tax Appeals was without authority on November 20, 1935, to find any deficiency for 1927 or 1929 in excess of the amount originally determined and asserted by the Commissioner in the deficiency notices as originally issued and as satisfied by payment on April 2, 1934; (2) that any such increased deficiencies found by the Board are null and void and as though never made; and (3) that the attempted credit of the allowed overpayment for 1928 against any such additional deficiencies for 1927 and 1929 was illegal and void.

This contention raises the question, first, whether a decision of the Board of Tax Appeals which has become final under the statute can be questioned in this or in any court. We think it is clear from the provisions of the Revenue Acts of 1926 and 1928 that such decisions cannot be questioned and certainly not by an original suit to recover an amount collected either directly or by a lawful credit pursuant to a decision which has become final. When the Commissioner determines and notifies a taxpayer of a deficiency, the taxpayer has the election of instituting a proceeding before the Board of Tax Appeals and prosecuting the case through the appropriate Circuit Court of Appeals to the Supreme Court if a writ of certiorari is granted, or of paying the tax and suing to recover it in whole or in part. If he elects to go to the Board of Tax Appeals, that is the sole remedy. This has been decided too often to require citation of authority, but see *Bankers Reserve Life Co.* v. *United States*, 70 C. Cls. 379; *Warner Co.* v. *United States*, 83 C. Cls. 495; *Virginia-Lincoln Furniture Corp.* v. *Commissioner*, 67 Fed. (2d) 8, 9. If a decision of the Board of Tax Appeals is appealed and reversed and under the mandate of the appellate court the Board is directed to take such further proceeding as may be necessary to carry out the decision of the appellate court, it seems clear under the provision of the statute defining the jurisdiction, powers, and authority of the Board of Tax Appeals and the appellate courts upon review that the only means available to contest the cor-

rectness of a final decision of the Board entered pursuant to the opinion and mandate of the appellate court or the authority of the Board to make such decision is by an appropriate proceeding in the Court of Appeals. See Section 1005 (c), Act of 1926. We have been unable to find any statute and we think there is none that grants to a taxpayer who has taken his case to the Board of Tax Appeals after the enactment of the Revenue Act of 1926, the right by an original suit for refund to question the correctness or legality of a judgment of the Board which has become final.

The second part of the contention made in support of the third alleged cause of action is that after an original hearing or a rehearing before the Board, preceding an appeal, and after a hearing before the Circuit Court of Appeals the Board cannot enter a judgment for a deficiency in excess of the deficiency originally determined by the Commissioner in his deficiency notice mailed to the taxpayer under section 274 of the Revenue Act of 1926 or 272 of the Revenue Act of 1928, unless a specific claim for such increased deficiency is made by the Commissioner before the final hearing by the Board. It is therefore urged that if such claim for such increased deficiency is not made by the Commissioner, a decision by the Board to the extent that it includes a deficiency in excess of that originally determined by the Commissioner is null and void, of no effect, and that the taxpayer in such case is in the same position with respect to the right to institute an original suit for refund as if the Commissioner had collected "an amount in excess of an amount computed in accordance with the decision of the Board which has become final" under section 284 (a) (d) (2) of the Revenue Act of 1926.

There are several reasons why these contentions cannot be sustained, one of which has already been stated, namely, that in such a case the taxpayer's only remedy is by an appropriate proceeding in the Circuit Court of Appeals. Second, the requirements of sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928, respectively, were designed and intended (1) to prevent the Board of Tax Appeals from increasing deficiencies determined by the Commissioner by

reason of a decision on questions not raised by the taxpayer in the proceedings instituted before the Board and with respect to which the taxpayer had not been given an opportunity to be heard before the Board, and (2) to require the Commissioner if he should conclude that, because of matters other than those put in issue by the taxpayer, the deficiencies theretofore determined by him for the year or years involved should be increased, he should make claim therefor before the Board at the original hearing or at a rehearing.

Where a taxpayer before the Board raises certain specific issues with reference to the year or years involved and a decision of those issues in favor of the taxpayer produces a larger deficiency for such year or years than that set forth in the deficiency notices of the Commissioner, no specific claim by the Commissioner is, in our opinion, required by the statutes in order to give the Board authority to enter a decision for the correct deficiency. Section 278 (e) *supra* was enacted for the protection of the taxpayer against any action by the Commissioner or the Board which would increase his tax over that first determined by the Commissioner because of any matters not put in issue by the taxpayer without affording such taxpayer an opportunity to be heard, and to place the burden of proof upon the Commissioner if he should raise new issues involving an increased deficiency. When a decision in favor of the taxpayer by the Board or the Court of Appeals of the issues raised by the taxpayer produces a greater tax for the year or years involved in the proceeding than that originally determined by the Commissioner, the taxpayer has, itself, conferred upon the Board jurisdiction and authority (so far as section 278 (e) is concerned) to enter a decision or decisions for the correct deficiencies. In such a case we think the section is not applicable. But, if it is, its design and purpose have been fulfilled. A taxpayer ought to know what the effect of a decision in his favor on the issues raised will be when he takes a case to the Board of Tax Appeals. If he succeeds in having his contentions allowed he cannot complain if the allowance of such contentions produces a

greater tax than that originally determined by the Commissioner. In such a case the provisions of section 274 (e) and section 272 (e) of the Revenue Acts of 1926 and 1928 do not enter into the matter for they do not require the Commissioner to anticipate what the effect of a decision by the Board or a Circuit Court of Appeals will be if the questions raised are decided in the taxpayer's favor.

A third reason for denying this contention is that when a case decided by the Board is appealed to and reversed by the Circuit Court of Appeals, such court is not limited by the provisions of sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928 in the decision of the issues raised on appeal by the taxpayer. Section 1003 (b) provides that "Upon such review, such courts shall have power to affirm, or if the decision of the court is not in accordance with law, to modify or reverse the decision of the court, with or without remanding the case for a rehearing, as justice may require." If justice requires that issues raised by the taxpayer on appeal be decided in his favor and if such a decision results, as it did in this case, in deficiencies in excess of those originally determined by the Board, the taxpayer is in no position to complain. The provisions of the statute with reference to the determination of increased deficiencies were obviously intended to protect the taxpayer against the assertion of the increased deficiencies by the Commissioner in excess of those determined by him in the statutory deficiency notice and against a determination by the Board of increased deficiencies by reason of a decision on matters of which the taxpayer has not been advised and not raised by either party before the Board. It would be a strained construction of the section to hold that it was intended to protect the taxpayer against his own deliberate acts or the natural and necessary consequences of a correct decision of the issues raised by him.

The fourth and final reason which requires a decision against plaintiff on its contention made in support of the third alleged cause of action is that if it be assumed that the Board upon the opinion and mandate of the Circuit Court of Appeals did not have authority or jurisdiction to

enter the decision of November 20, 1935, for the increased deficiencies for 1927 and 1929, unless claim therefor was made by the Commissioner at or before the final hearing, a proper claim by the Commissioner for the increased deficiencies of $12,234.67 for 1927 and $330.01 for 1929 was made by the Commissioner in sufficient compliance with the provisions of sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928, respectively. When the original determinations of the Commissioner and the first decisions of the Board with respect to the years involved were reversed by the Circuit Court of Appeals, the cases were remanded for further proceedings in accordance with the opinion of the Circuit Court of Appeals. In due course the Board, by an order duly entered, restored the proceedings to its docket and placed them upon its day calendar for final decision in accordance with opinion and mandate of the Circuit Court of Appeals for the Second Circuit. In its order of February 27 the Board directed the parties to submit computations of the plaintiff's tax liability for the years 1927, 1928, and 1929. Thereafter, pursuant to the order of the Board, the Commissioner on April 19, 1935, filed a recomputation of the tax for the years involved and on April 29, 1935, plaintiff filed an alternative computation. The proceedings were thereafter taken under submission by the Board for final decision. Although the petition in this case does not so allege, we must assume that the recomputation prepared and filed with the Board by the Commissioner carried out the opinion of the Circuit Court of Appeals upon the issues raised by the taxpayer, and that such recomputation otherwise complied with the mandate of the Court. The correctness of the Commissioner's recomputation or the decisions of the Board is not questioned in the petition in this case. The filing of the recomputation pursuant to the order of the Board of February 27, 1935, and the submission of the cases thereon to the Board for final decision was a rehearing within the meaning of sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928. The Commissioner was therefore enabled at such time to make claim for the first time for increased deficiencies, and if his recom-

putation carried out the opinion and mandate of the Circuit Court of Appeals, which we assume it did, and which is not denied by the petition in this case, he made a valid and legal claim for the increased deficiencies within the meaning of the sections in question. The judgments of the Board were therefore in all respects legal and proper. See *Ralph W. Crews, et al.* v. *Commissioner*, 37 B. T. A. 387.

In support of the fourth alleged cause of action, plaintiff contends that under the provisions of sections 277 (b) and 277 of the Revenue Acts of 1926 and 1928 the unexpired portion of the statute of limitation remaining at the time the deficiency notices were mailed may not be carried over and added to the sixty days after the decision of the Board becomes final for the purpose of assessing the deficiencies determined by the Board. Upon this construction it is insisted that the assessment of the additional deficiencies for 1927 and 1929 at a date beyond sixty days after the decisions of the Board became final was illegal and void and that the attempted credit of the overpayment for 1928 against such assessment was illegal and void. To sustain this contention would require the conclusion that the statute of limitation was only made ineffective after the mailing of the deficiency notice and if the three or two-year period of limitation specified in the acts expired before the decision of the Board became final under the statute, the Commissioner had only sixty days after the decision became final within which to assess the tax determined by the Board to be due. It seems clear to us that this contention is contrary to the express language of section 277 (b) of the Revenue Act of 1926 as amended and section 277 of the Revenue Act of 1928, and to the intent of Congress. The sections mentioned are identical. They provide that the stated basic period of limitation upon assessment *shall be suspended* for a definite and specified period easily calculable—namely, for the period between the date of the mailing of the deficiency notice until the date when the Commissioner may assess the tax, and, in any event, if a proceeding is placed on the docket of the Board, until the decision of the Board becomes final and for sixty days

thereafter. "Suspended" was here used in its common and general usage, meaning held in abeyance, temporarily inoperative, arrested, interrupted, stopped for a time. And we think it is clear that Congress intended by the language used that the limitation period specified in the statutes should simply be held in abeyance and should not run during the specified period and that at the end of such period the statute should again commence to run. The sixty days after the decision of the Board becomes final is simply a part of the suspended period and the Commissioner is entitled, in making the assessment of a deficiency determined by the Board, to use the sixty-day period together with any unexpired portion of the statute of limitation remaining at the time it became suspended by the mailing of the deficiency notice. We think the language of the statute is not reasonably susceptible to any other construction. It plainly states that the running of the statue of limitation shall be suspended and this can only mean that when the period of suspension ceases the limitation period again commences to run. There is nothing to indicate that Congress intended in any case to shorten the period of limitation. On the contrary it expressly lengthened the period under the circumstances mentioned. The case of *Hoosac Mills Corporation et al.* v. *Commissioner*, 75 Fed. (2d) 462, 464, relied upon by plaintiff, does not support the contention that the unexpired portion of the limitation period fixed by the statute, or as extended by waiver, is not carried over or made applicable to the matter of assessment after the decision of the Board becomes final. The majority of the court in that case simply held that the sixty days additional after the decision of the Board became final might not be added to the unexpired portion of the statutory period of limitation. We cannot agree with the holding of the court that the unexpired portion of the period of limitation remaining at the time it became suspended became operative again at the date when the decision of the Board became final under the statute, i. e., thirty days after it was entered. The period of sixty days after the decision of the Board becomes final is as much a

part of the period during which the running of the statute of limitation is suspended as the period between the date of the mailing of the deficiency notice and the date on which the decision of the Board becomes final. *Continental Oil Co.* v. *United States*, 83 C. Cls. 344, 358. Upon our interpretation of sections 277 (b) of the Revenue Act of 1926 as amended and section 277 of the Revenue Act of 1928, the statute of limitation as extended by the suspended period did not expire as to either of the years 1927 or 1929 prior to March 28, 1936. The decision of the Board as to both years became final December 21, 1935. The suspended period, i. e., from February 5, 1931, the date of the mailing of the deficiency notice for 1927, to December 21, 1935, inclusive, plus sixty days, expired February 19, 1936. The portion of the limitation period remaining when the suspension became effective on February 5, 1931, was, as to 1927, thirty-seven days. The additional deficiency determined by the Board was assessed March 27, 1936. This assessment was therefore timely.

With respect to the year 1929, the deficiency notice was mailed November 16, 1931, and the decision of the Board became final December 21, 1935. The deficiency was assessed in accordance with the decision of the Board, March 27, 1936. The period of limitation of two years prescribed in section 275 of the Revenue Act of 1928 would have expired on March 14, 1932, except for the suspension thereof on November 16, 1931, to and until December 31, 1935, and for sixty days thereafter. One hundred and twenty (120) days of the original period still remained upon the expiration of the sixty days mentioned. The assessment of the deficiency for 1929 on March 27, 1936, was therefore well within the time allowed by the statute.

The fifth and last alleged cause of action is based upon a claimed account stated as evidenced by the certificate of overassessment for 1928 mailed to plaintiff on April 13, 1936, and received by it in due course. The account stated cause of action is based on the assumption (1) that the statute of limitation had barred the determination, assessment, and the collection of any further deficiencies for 1927 and 1929

by reason of the payment on April 2, 1934, of the deficiencies first determined by the Commissioner and the Board; (2) that the deficiencies finally determined by the Board were barred by the statute of limitation because the Commissioner did not make claim therefor before the Board prior to the expiration of the statute of limitation suspended for the period between the date of the mailing of the deficiency notice and March 9, 1934, or April 2, 1934; (3) that the deficiencies were illegal and void because the Board was without jurisdiction or authority to enter judgments therefor, and (4) that they were barred because no portion of the unexpired statute of limitation may, under the statute, be carried over and applied to the period of sixty days after the decision of the Board became final. We have decided all these questions against the plaintiff. The overpayment for 1928 determined by the Board of Tax Appeals and allowed by the Commissioner under a timely claim for refund was credited by the Commissioner against the final deficiencies determined by the Board for 1929 and the balance of such overpayment, plus an overpayment of interest and interest on the overpayment of tax and interest, was credited in partial satisfaction of the final deficiency of $12,234.67 determined by the Board for 1927. This left a balance of approximately $2,443.84 of the final deficiency in tax determined for 1927 still due from plaintiff. This balance has not as yet been paid and collection by the defendant has been prohibited by an injunction issued by the United States District Court of the State of Connecticut January 28, 1938, in an equity suit instituted in that court by the plaintiff against the Collector of Internal Revenue. We think the unpaid balance of the deficiency determined for 1927 with interest is legally due and collectible for the several reasons hereinbefore stated and it is clear that there was no account stated in the certificate of overassessment attached to the petition as Exhibit "B". No balance in favor of plaintiff was stated and there was no implied promise to pay the overpayment of $7,047.30 for 1928 determined by the Board other than through and by means of a lawful credit against any other taxes then due from the

taxpayer. If there were other taxes due and owing by the taxpayer for 1927 and 1929, as we have held there were, the credit to such taxes of the overpayment for 1928 here sought to be recovered was mandatory and was accordingly made by the Commissioner. The opinions of this court in *Ohio Steel Foundry Co.* v. *United States*, 69 C. Cls. 558; *Goodenough* v. *United States*, 85 C. Cls. 258, 19 F. Supp. 254, 259; *Shipley Construction & Supply Co.* v. *United States*, 79 C. Cls. 736, 7 F. Supp. 492; *Wood* v. *United States*, 84 C. Cls. 367, 17 F. Supp. 521; *Clifton Mfg. Co.* v. *United States*, 85 C. Cls. 525, are relied upon by plaintiff in support of its right to recover the overpayment for 1928 on an account stated. Those decisions might be applicable here if there had been no taxes due for other years against which the Commissioner was required to credit the overpayment for 1928 or if the deficiencies determined by the Board for such other years had been barred by the statute of limitation at the time they were assessed or their collection barred at the time the credit was made. *United States* v. *Swift & Co.*, 282 U. S. 468; *McEachern* v. *Rose*, 302 U. S. 56; *Garbutt Oil Co.* v. *United States*, 89 Fed. (2d) 749. However, as we have held herein, the taxes for 1927 and 1929 against which the 1928 overpayment was credited by the Commissioner were correct in amounts, were legally and properly determined by the Board pursuant to the statute and in accordance with the opinion and mandate of the Circuit Court of Appeals for the Second Circuit from which final decisions by the Board no further appeal was taken, and were timely assessed. They were therefore legally due and owing by plaintiff at the time the Commissioner made the credit. The demurrer is therefore sustained and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLARD T. WHITE, EDWIN G. LAUDER, JR., AND J. HENRY WALTERS, RECEIVERS OF AND FOR THE EFA OPERATING CORPORATION v. THE UNITED STATES

[No. 43488. Decided April 4, 1938]

On the Proofs

Income tax; corporation dissolved; statute of limitations.—Where a corporation on March 12, 1931, filed its return for the calendar year 1930 and with that return made a written request under Section 275 (b) of the Revenue Act of 1928 for a prompt determination and assessment of its tax liability for 1930, it is held that the provisions of section 275 (b) applied to the written request and that collection of an additional tax, and interest, was barred by the statute of limitation of one year when tax and interest were assessed February 18, 1933.

Same; history and intent of section.—An examination of the history of the section, 275 (b), leads to the conclusion that Congress intended the benefit of the one year limitation period to extend and become available to a corporation which had become completely dissolved, as well as to corporations contemplating dissolution, at the time request for prompt determination was made; the three stipulated requirements of the section are alternative, and compliance with any one is sufficient to set in motion the one year period of limitation.

Income tax; reorganization.—Where taxpayers received bonds in new or consolidated corporation in exchange for stock which it had held in six of the eight constituent corporations, it is held that the bonds were securities within the meaning of section 112 (b); it was not necessary that the plaintiff receive stock in order to be a party to the reorganization.

The Reporter's statement of the case:

Mr. Harry Levine for the plaintiff.

Mr. Samuel E. Blackham, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover $30,443.13, representing additional income tax of $27,291.19 and interest of $3,151.94 for

the calendar year 1930 assessed February 18, 1933, and collected June 27, 1933. The three questions involved are (1) whether a written request by plaintiff filed March 12, 1931, with its return for the calendar year 1930 for a prompt determination and assessment of its tax liability in pursuance of section 275 (b) of the Revenue Act of 1928 (45 Stat. 791) (the plaintiff having become dissolved January 16, 1931) was a compliance with that section and sufficient to start the running of the statute of limitation of one year as therein provided; (2) whether there was a reorganization under the Revenue Act of 1928 in the statutory merger of eight constituent corporations with the RKO Midwest Corporation and, if so, whether the receipt by plaintiff of bonds and cash upon the exchange by it of stock which it held in six of the merged corporations resulted in a partly tax-free transaction under that act; and (3) whether certain dividends of the Providence Theatre Company and the Providence Victory Corporation, aggregating $228,807.59, declared and paid by those corporations to plaintiff on April 14, 1930, were ordinary dividends or liquidating dividends within the meaning of the pertinent sections of the Revenue Act of 1928.

Plaintiff contends (1) that the written request made under section 275 (b) for prompt assessment was a full compliance with that section; that the one-year period of limitation for assessment became applicable and that the additional tax and interest, which were not assessed until after that period, were barred; (2) that there was a reorganization and that the bonds received in exchange for stock were securities within the meaning of the taxing act and that it was therefore a partly tax-free transaction, and (3) that the dividends in question were ordinary dividends and not liquidating dividends, as held by the Commissioner. If plaintiff is correct as to any one of the questions, it is entitled to judgment for the additional tax and interest claimed.

Counsel for defendant contend (1) that inasmuch as the Efa Operating Corporation was dissolved January 16, 1931, before the written request for prompt assessment was made

under section 275 (b) this section does not apply and the period of limitation of one year, after the making of such written request, did not become effective; (2) that plaintiff was not a party to a reorganization within the meaning of the reorganization provisions of the Revenue Act of 1928 for the reasons that it sold its stock in six of the corporations to the RKO Midwest Corporation for cash and bonds, and that the bonds were not securities within the meaning of the reorganization provisions; and (3) that the dividends mentioned were liquidating rather than ordinary dividends.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. *Statute of Limitation under Section 275 (b) of the Revenue Act of 1928.*—At a meeting held by the Board of Directors of the Efa Operating Corporation on December 18, 1930, it was resolved that the said corporation be dissolved pursuant to the general laws of the State of Delaware. On the 20th of December, 1930, all the stockholders of the corporation subscribed to an instrument unanimously consenting to the dissolution in pursuance of Section 39 of the General Corporation Law of the State of Delaware.

The said instrument of unanimous consent dated December 20, 1930, was duly filed with the Secretary of State of the State of Delaware and its statutes regarding dissolution were otherwise complied with, resulting in the legal dissolution of the Efa Operating Corporation on January 16, 1931.

Efa Operating Corporation filed its income tax returns with the Commissioner of Internal Revenue on the basis of the calendar year. Its income tax return for the calendar year 1930 was due, under the Revenue Act of 1928, on March 15, 1931. It filed the said return for the calendar year 1930 with the Collector of Internal Revenue of the Third District of New York on March 12, 1931. Annexed to this return was a request, in pursuance of Section 275 (b) of the Revenue Act of 1928, for a prompt determination

and assessment of its income tax liability. This request for prompt assessment was as follows:

MARCH 7, 1931.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

SIR: Pursuant to Section 275 (b) of the Revenue Act of 1928, formal request is hereby made for a prompt determination and assessment of the income tax liability of the Efa Operating Corporation.

This corporation was duly dissolved on January 16, 1931.

The return for the year 1930 is annexed hereto.

Yours very truly,

EFA OPERATING CORPORATION,
By J. HENRY WALTERS,
Secretary.

The assessment of the deficiency for 1930 amounting to $27,291.19, for the reasons hereinafter stated in finding 3, was made by the Commissioner of Internal Revenue on February 18, 1933, and the Efa Operating Corporation paid the deficiency on June 27, 1933.

2. *Reorganization, Section 112, Revenue Act of 1928.*—The RKO Midwest Corporation was organized on or about May 16, 1930, under the laws of the State of Ohio by the Radio-Keith-Orpheum Corporation, a Maryland corporation, in pursuance of a plan, the object of which was the acquisition, through merger, with the RKO Midwest Corporation of the following named corporations, hereinafter sometimes called the constituent corporations:

The Cincinnati Capitol Theater Company;
The Vine Street Lyric Theater Company;
The Cincinnati Family Theater Amusement Company;
The Strand Amusement Company;
The Palace Amusement Company;
The B. F. Keith Dayton Theatre Company;
The Dayton Colonial Amusement Company; and
The C. & D. Theater Company.

Radio-Keith-Orpheum Corporation, at the organization of the RKO Midwest Corporation, was itself engaged through certain of its subsidiaries in the theatrical business and it purchased the entire authorized capital stock of RKO Midwest Corporation consisting of 25,000 shares of

the par value of $100 each, for cash, to continue under the latter name the theatrical businesses of the constituent corporations.

All of the constituent corporations operated motion picture theatres in or about Cincinnati, Ohio. The first five above named operated theatres in Cincinnati and the last three above named operated theatres in Dayton, Ohio. The plan of reorganization embodied in an agreement of consolidation was submitted to the stockholders of each of the constituent corporations, and at duly called meetings to consider the plan the stockholders approved the said agreement of consolidation, copy of which agreement is annexed to the stipulation of facts herein as Exhibit "D," and is made a part hereof by reference.

The agreement of consolidation was duly filed in the office of the Secretary of State of the State of Ohio on June 19, 1930, and the constituent corporations were effectually merged into the RKO Midwest Corporation and the existence of each of the said constituent corporations ceased thereafter.

Pursuant to said agreement of consolidation (Clause Eighth) and in accordance with the General Corporation Act of the State of Ohio, after the existence of each of the constituent corporations ceased, the consolidated corporation, that is to say, the RKO Midwest Corporation, came into possession of all the rights, privileges, powers, franchises, and immunities, and became subject to all the liabilities and duties of each of the constituent corporations merged. All estate, real, personal, and mixed, became vested in the RKO Midwest Corporation and all debts, liabilities, and duties of the respective constituent corporations attached to the said corporation.

The Efa Operating Corporation held stock in the following named constituent corporations entering the merger:

The Cincinnati Capitol Theater Company,
The Vine Street Lyric Theater Company,
The Palace Amusement Company,
The B. F. Keith Dayton Theatre Company,
The Dayton Colonial Amusement Company, and
The C. & D. Theatre Company.

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In pursuance of the agreement of consolidation, the holders of stock of the constituent corporations received the Secured 6% Serial Gold Bonds of RKO Midwest Corporation (the terms and maturities of which are described more fully in Schedule A of the agreement of consolidation), and cash in exchange for the stock in said constituent corporations. None of these 6% Serial Gold Bonds of RKO Midwest Corporation was retired before the maturity date stated in said bonds.

The Efa Operating Corporation in its income tax return for 1930 included the bonds so received at their par value and the cash as the basis for computing the gain or loss on the exchange. In the following table, there is opposed against the cost of the stock of each of the constituent corporations, as found by the Commissioner of Internal Revenue, the amount of bonds valued at par and cash actually received in exchange for the stock of each of the constituent corporations held, and the amount of profit reported by the Efa Operating Corporation (as modified by the Commissioner of Internal Revenue) on each of these exchanges:

Company and holdings	Cost	Received in exchange		Profit found by the Commissioner
		Bonds	Cash	
The Cincinnati Capitol Theater Co., 30 shares	$3,000.00	$25,200.00	$24,795.00	$46,995.00
The Vine Street Lyric Theater Co., 164 shares	16,400.00	44,386.31	43,870.29	71,856.60
The Palace Amusement Co., 538 shares	[1] 35,863.08	79,572.00	86,616.20	130,325.12
The B. F. Keith Dayton Theatre Co., 655 shares	65,500.00	73,367.04	72,284.64	80,151.68
The Dayton Colonial Amusement Co., 100 shares	10,000.00	34,406.40	34,322.40	58,728.80
The C. & D. Theatre Co., 5 shares	500.00	240.00	215.00	[2] 45.00
Total	131,263.08	257,171.75	262,103.53	388,012.20

[1] Reported cost of $53,800 adjusted. Difference of $17,936.92, added to $370,075.28 reported in the return for 1930 and mentioned in the petition, gives the figure of $388,012.20 in table.
[2] Loss.

The petitioner, after the Commissioner of Internal Revenue determined the deficiency in this cause referred to, duly filed a claim for refund alleging that the profit it returned and as found by the Commissioner of Internal Revenue was overstated to the extent of the amount of the bonds received

on the exchange of its stock in the constituent corporations upon their merger into the RKO Midwest Corporation, that is to say, to the extent of $257,171.75. This claim was based on the ground that a reorganization had been effected resulting in a partly tax-free exchange under the statutes. The Commissioner of Internal Revenue rejected the claim in his letter dated September 17, 1936. A copy of this claim is attached to the petition as Exhibit C, and is made a part hereof by reference.

On the same date, the Commissioner of Internal Revenue rejected the petitioner's claim which had been duly filed (Exhibit "B" in the petition) involving the dividend and statute of limitations issues.

3. *Dividends, Section 115 of the Revenue Act of 1928.*—The Efa Operating Corporation was organized under the laws of the State of Delaware on January 20, 1928, and was duly dissolved under the laws of that state on or about January 16, 1931. It was organized principally for the purpose of holding stocks of corporations engaged in the motion picture and vaudeville theatre business, and during the period of its active existence it was so engaged.

In pursuance of its said business purposes and from the time of its organization and during the calendar year 1930, it held the entire outstanding capital stock of the Providence Theatre Company, a corporation organized on August 26, 1910, under the laws of the State of New York, and the Providence Victory Corporation, a corporation organized on August 17, 1923, under the laws of the State of New York. The said Providence Theatre Company and Providence Victory Corporation operated motion picture theatres in the City of Providence, Rhode Island.

As at April 14, 1930, the undistributed profits and surplus of the Providence Theatre Company amounted to $145,910.43 and it had cash in excess of that amount in banks as shown on its balance sheet as at that date, annexed to the stipulation of facts as Exhibit "A-1," and is made a part hereof by reference.

As at April 14, 1930, the undistributed profits and surplus of the Providence Victory Corporation amounted to $82,-

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897.16, and it had cash in excess of that amount in banks as shown on its balance sheet as at that date, annexed to the stipulation of facts as Exhibit "B-1," and is made a part hereof by reference.

At a meeting held on April 14, 1930, the Board of Directors of the Providence Theatre Company declared a dividend of its undistributed profits and surplus amounting to $145,-910.43. Copy of the minutes of the meeting is annexed to the stipulation as Exhibit A, and is made a part hereof by reference. The corporation paid the dividend in cash on April 14, 1930, to its sole stockholder, the Efa Operating Corporation.

At a meeting held on April 14, 1930, the Board of Directors of the Providence Victory Corporation declared a dividend of its undistributed profits and surplus amounting to $82,897.16. Copy of the minutes of the said meeting is annexed to the stipulation as Exhibit B, and is made a part hereof by reference. The corporation paid the dividend in cash on April 14, 1930, to its sole stockholder, the Efa Operating Corporation.

The Efa Operating Corporation included in its accounts for the calendar year 1930 the aggregate amount of these dividends, to wit: $228,807.59 as ordinary dividends, and in its income tax return for the calendar year 1930, reported the dividends as free of tax. The Commissioner of Internal Revenue in his letter of deficiency, hereinafter mentioned, ruled that the said dividends were liquidating dividends and included the entire aggregate amount thereof in income subject to tax. The addition to income of the latter amount, less certain offsetting adjustments not material to this cause, accounts for the entire deficiency of tax here sought to be recovered.

In the case of each corporation the surplus was earned after March 1st, 1913, upon which earnings each of the corporations paid taxes to the Government and from which earnings dividends, including those under consideration, were declared from time to time by each of the corporations. The following list shows the dividends paid by each corpo-

ration to, and during the existence of, the Efa Operating Corporation:

PROVIDENCE THEATRE COMPANY

Date	Dividends paid	Surplus remaining after payment of dividend as at Dec. 31 of each year
March 14, 1928	$27, 319. 03	$259, 484. 10
July 9, 1929	120, 000. 00	138, 531. 65
April 14, 1930	[1] 145, 910. 43	None

PROVIDENCE VICTORY CORPORATION

Date	Dividends paid	Surplus remaining after payment of dividend as at Dec. 31 of each year
March 19, 1928	$98, 992. 94	$109, 356. 57
1929	None	81, 833. 41
April 14, 1930	[1] 82, 897. 16	None

[1] Dividends questioned and under consideration in this cause.

On April 24, 1930, Efa Operating Corporation, the sole stockholder of each of these two corporations, at a duly convened meeting, authorized the Board of Directors to take steps to dissolve each of the corporations. The Board of Directors of each corporation met on the same day and ratified the action of the stockholder. Thereafter, the necessary legal action was taken to dissolve each of the corporations and legal dissolution was effected in the case of each corporation on July 1st, 1930, and each of the corporations distributed its assets in exchange for and in cancellation of its outstanding capital stock.

The court decided that the plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts with reference to the first question show that at a meeting of the Board of Directors of the plaintiff on December 18, 1930, it was resolved that the corporation be dissolved and that on December 20, 1930, all the stockholders of the corporation subscribed to an instrument unanimously consenting to its dissolution in pursuance of Section 39 of the General Corporation Law of the State of Dela-

ware. This consent was filed in due course with the Secretary of State of Delaware and the statutes of that state with reference to dissolution of corporations were otherwise complied with. This resulted in the legal dissolution of the EFA Corporation on January 16, 1931, after the close of its taxable calendar year 1930.

The corporation filed its return for the calendar year 1930 on March 12, 1931, and with that return it made a written request under section 275 (b) of the Revenue Act of 1928 (45 Stat. 791) for a prompt determination and assessment of its tax liability for 1930. We are of opinion that the provisions of section 275 (b), set forth in full below, applied to the written request made March 12, 1931, and that collection of the additional tax and interest thereon was barred by the statute of limitation of one year fixed by section 275 when the tax and interest were assessed February 18, 1933.

> (b) *Request for prompt assessment.*—In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of two years after the return was filed. This subsection shall not apply in the case of a corporation unless—
>
> (1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such year; and
>
> (2) The dissolution is in good faith began before the expiration of such year; and
>
> (3) The dissolution is completed.

Counsel for defendant contend that section 275 (b), insofar as it relates to the tax of a corporation, applies solely and only to a corporation which is *contemplating* dissolution at or before the expiration of the year in which the request is filed at the time the written request for prompt assessment is made, and that such section *cannot* apply to a corporation which becomes dissolved after the end of the

last taxable year covered by the request but before the return is filed and the request is made. This construction of the section would defeat its main purpose. It is obvious that the whole purpose of the section was to permit a corporation in dissolution to obtain a prompt and early determination of its tax liability in order that all matters incident to dissolution and the affairs of such corporation might be promptly administered and settled, its debts paid, and its assets distributed, without having to wait more than one year after written request for determination and assessment of its federal tax liability to wind up and settle such affairs. In order fully to accomplish the purposes intended the section permitted a corporation contemplating dissolution within one year to make written request at the time of the decision to begin dissolution proceedings for prompt determination and assessment, thereby obtaining the benefit of the short period of limitation on assessment and, also, obtaining a final determination and advice with respect to its tax liability by the time the dissolution should be completed or well underway toward completion. Although the section requires that the written request by a corporation which contemplates dissolution shall advise the Commissioner that the corporation contemplates dissolution at or before the expiration of one year after the date of the request, Report No. 2, 70th Congress, First Session, of the Ways and Means Committee of the House of Representatives, states that dissolution must in good faith be begun within a year after the request is made and that such dissolution must be completed whether or not within the year.

Section 275 (b) relating to corporations was first enacted in the Revenue Act of 1928. Prior statutes shortened the period of limitation only as to cases of income received during the lifetime of a deceased individual. When the provisions affecting corporations are examined for the large meaning, as we think they must be, it appears evident that the purpose of their enactment was to afford relief from the usual period of limitation to corporations dissolved or contemplating dissolution, upon the compliance, by the corporations, with certain requirements. The purpose was to

enable such corporations to wind up their affairs and distribute the assets without being confronted with the uncertainty of a demand which might later be made for federal taxes. The first sentence of subdivision (b) would, without doubt, include a corporation which had become dissolved at the time the request was made and we find nothing in the language of the second sentence which excludes a corporation whose dissolution occurs between the time the decision to dissolve is reached and the date the return is made, and therefore before the date on which a request for prompt assessment could be made under the statute. Moreover, complete dissolution is necessary before the corporation can become completely and absolutely entitled to claim the benefits of the one-year period of limitation. While the statute does not require that the dissolution become final and complete within one year after the written request for prompt assessment is made, the dissolution must in good faith be begun before the expiration of such year and be completed in due and legal course of dissolution proceedings which would be within a reasonable time. In the case of a corporation which became completely dissolved before the date on which request for prompt assessment could be made pursuant to dissolution proceedings begun in good faith, and the request notifies the Commissioner that the corporation was duly dissolved, such written request is a notification to the Commissioner that all of the matters contemplated and all of the steps required by subdivision (b) have been complied with. In such case the limitation of one year becomes completely effective without further conditions or further action. This view is supported by the legislative history of the amendment which embodied the provisions affecting corporations. In the interim, 69th & 70th Congresses, the Ways and Means Committee of the House of Representatives held hearings on the proposed Revenue Bill of 1928. The Special Committee on Taxation of the Bar of the City of New York appeared before the Committee and presented a written recommendation. The recommendation of the Special Committee on Taxation and the report upon which the recommendation

was based are published at pages 462 to 471 in Public Document entitled "Hearings Before the Committee on Ways and Means, House of Representatives, interim 69th and 70th Congresses." At page 465 of said document the following recommendation of the Special Committee on Taxation appears, as follows:

> 7. Statute of Limitations on Additional Assessments in case of dissolved corporations. (Sec. 277.)
>
> The law should be amended to include a provision that additional assessments with respect to corporations which have been dissolved shall be made within one year after written request therefor by the proper representative of the dissolved company.
>
> It is impossible for the representatives of a dissolved corporation to proceed with the distribution of its assets without a final determination with respect to the tax liability of the company in the years preceding its dissolution. Although it is the intention of the Bureau to expedite audits in such cases, long delays are frequent and the stockholders of a corporation are deprived of their distributive shares of the assets until the Commissioner has audited the corporate returns and a final determination has been reached with respect to the tax liability. The number of corporations liquidating annually is not so large as to make it very difficult for the Commissioner to complete the audit and determine the tax liability of such companies within one year after receiving a request to do so.

Thereafter, in due course, the provision fixing a limitation period of one year for assessment of the tax, i. e., on the income of corporations in dissolution, was inserted in the Revenue Bill of 1928 and was duly enacted. The Ways and Means Committee and the Congress apparently deemed it desirable, upon consideration of the matter, to extend the privilege of the short period of limitation to corporations not only dissolved but to those contemplating dissolution and the section was framed so as to include both. That the section intended to extend to a corporation which had become dissolved the privilege of obtaining prompt determination and of claiming the benefits of the short period of limitation seems clear in view of the motive for the provision and the purposes intended to be accomplished thereby, as expressed

in the report of the Ways and Means Committee, *supra*, at page 23, as follows:

> In the case of a corporation about to dissolve, the prompt determination of tax liability becomes particularly desirable. Moreover, the collection of such taxes, if delayed, may become uncertain. Accordingly, a provision is incorporated under which a corporation about to dissolve may notify the Commissioner that it contemplates dissolution within a year and the assessment or proceeding in court for collection without assessment of any deficiency shall be begun within the year, provided that dissolution is in good faith begun before such time and that the dissolution is completed whether or not within the year.

When a corporation dissolved between the close of a taxable year and the date when the return was filed, a prompt determination of the tax liability would, it seems, be more desirable than in the case of a corporation contemplating dissolution, and the collection of such taxes as might be due by the corporation when it became dissolved before the return was filed would be more likely to become uncertain if delayed than the taxes due by a corporation only contemplating dissolution at the time the return was filed. We think these considerations sustain the view that Congress intended that the benefit of the limitation period of one year should extend and become available to a corporation which had become completely dissolved at the time the request for prompt determination was made. The written request was otherwise proper. *Maffitt, et al.*, v. *Becker*, 65 Fed. (2d) 880. Under the interpretation urged by counsel for the defendant every corporation which had contemplated dissolution and had legally consummated it within the taxable year or the succeeding year, but before the filing of its return for the first year, would, because it could not make the request before submitting its return, be denied the relief afforded by the statute. This discrimination should not be lightly attributed to Congressional intent. In *Kohlsaat* v. *Murphy*, 96 U. S. 153, 160, the court said:

> Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any

Opinion of the Court

> particular enactment; but the controlling rule of decision in applying the statute in any particular case is, that, whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the legislature, except when the language employed will admit of no other signification.

Of the three requirements of section 275 (b), compliance with which makes the limitation period of one year effective, the most important one is that dissolution of the corporation must be completed, yet, under the defendant's contention, the benefit of this section is withdrawn from a corporation which has fulfilled all of the specified requirements. When a corporation contemplating dissolution makes application for prompt assessment the limitation of one year starts to run, but if dissolution is not in good faith begun after the request is made and is not completed in due course, the limitation period of one year does not become effective and the Commissioner has the usual and longer period within which to assess. A corporation in the situation of plaintiff has fulfilled all these requirements and the operation of the statute of limitation becomes completely effective upon the filing of the request for prompt assessment and there is nothing that stands in the way of final action by the Commissioner. We think therefore that the literal construction for which counsel for defendant contend destroys rather than promotes the real purpose of the provision. Counsel for defendant rely chiefly upon the use of punctuation marks (semicolons) to modify the effect of certain of the conjunctions in the latter part of the section, which are numbered (1), (2), and (3). We think each of the numbered requirements is alternative and that notice by the taxpayer to the Commissioner of any of the three requirements, namely, (1) the contemplated dissolution before the end of the year, (2) the beginning of dissolution proceedings, and (3) the completion of dissolution, is a sufficient compliance to set in motion the one-year period of limitation. If the notice informs the Com-

missioner that the last requirement has occurred, it is certain that the two preceding requirements have been complied with and the one year statute of limitation thereupon becomes completely effective; otherwise it begins to run but does not become completely effective until all three of the conditions have been complied with. In *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82, the court said:

> Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.

The rule is well settled that the intention of the legislator controls over the letter of the statute, if by following the strict letter of the statute would result in injustice and produce results not intended. In *Ozawa* v. *United States*, 260 U. S. 178, 194, the court said:

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

A statute should not be so narrowly construed as to defeat the object intended to be accomplished. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 464. In *Helvering* v. *Bliss*, 293 U. S. 144, 151, it was held that liberalizations of the law in the taxpayer's favor, begotten from motives of public policy, are not to be narrowly construed. In *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 93, the court said:

> The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of

the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will.

Section 275 (b) is in the nature of a relief provision. It brought about a change in preceding revenue acts and, as such, should be liberally construed in order that its object and purpose may be given effect. For the reason stated we think the tax and interest in question were barred at the time they were assessed and collected.

Our decision with respect to the statute of limitation makes it unnecessary to consider the other questions. However, with reference to the second or reorganization question, we are of opinion that there was a reorganization within the meaning of section 112 (i) (1) of the Revenue Act of 1928; that plaintiff was a party to a reorganization within the meaning of section 112 (i) (2); that the bonds received by plaintiff in the new or consolidated corporation in exchange for the stock which it held in six of the eight constituent corporations were securities within the meaning of section 112 (b) (3), and that it was not necessary that plaintiff should have received stock in the consolidated corporation in addition to such securities in order for it to be a party to the reorganization. *Helvering* v. *Watts*, 296 U. S. 387; *Kaspare Cohn Co., Ltd.* v. *Commissioner*, 35 B. T. A. 646; *Tyng, et al.* v. *Commissioner*, 36 B. T. A. 21; *Raymond* v. *Commissioner*, 37 B. T. A. 423; *Frances M. Averill, et al.*, v. *Commissioner*, 37 B. T. A. 485 (decided March 17, 1938). In the last-mentioned case it appears that in 1927 the taxpayers, as stockholders in A Co., exchanged their stock for cash and bonds in B Co., the latter company, a corporation resulting from a consolidation of A Co. and R. Co. The bonds which taxpayers acquired by the exchange matured serially and during the taxable years 1931 to 1933, inclusive, certain of the bonds matured. The Board held that the 1927 transaction was a statutory reorganization and that the provisions of section 203 (b) (2d) and (d) (1) of the Revenue Act of 1926 (44 Stat. 9) applied, and that the taxpayers were not entitled to determine and report the gain realized from the transaction on

the installment basis under section 202 (e) and 212 (d) of the Revenue Act of 1926.

Judgment will be entered in favor of plaintiff for $30,443.13 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THOMPSON MANUFACTURING COMPANY v. THE UNITED STATES

[No. 43525. Decided April 4, 1938]

On the Proofs

Internal Revenue; taxation of corporation dividend under National Industrial Recovery Act.—Where manufacturing corporation on January 16, 1933, declared an extra dividend of 80% "Payable soon as convenient," it is held that such dividend, paid in October, 1933, was not subject to 5 percent tax imposed by Section 213 of the National Industrial Recovery Act, approved June 16, 1933.

The Reporter's statement of the case:

Mr. Robert Ash for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a New Hampshire corporation with its principal office and place of business at Lancaster.

2. Early in 1933 stockholders of plaintiff started an agitation to have the plaintiff pay an extra dividend of 100 per cent and held an informal meeting at which that matter was discussed. Plaintiff's president and general manager felt that such a large dividend should not be paid, for the reason that he was of the opinion that the money necessary to pay it should be kept in the business, but other stockholders who held substantial amounts of stock and who were

not active in the company's management were insistent upon payment of the large dividend. At that time plaintiff had a surplus of $119,000, of which there was available for dividends the following:

Bonds and 10 shares of treasury stock	$52, 750. 00
Cash in Siwooganock Guaranty Savings Bank	26, 099. 75
Cash on hand and in Lancaster National Bank	9, 931. 00
Total	$88, 780. 75

Because of the objection of the president, referred to above, and the fact that the savings bank would have to sell some of its securities to get cash to allow the withdrawal from plaintiff's savings account, the stockholders decided upon an 80 per cent, instead of a 100 per cent, dividend. The dividend was to be paid on the outstanding stock and in the amount of $39,200. It was agreed that the dividend would be paid within a reasonable time and that a reasonable time would be from thirty to sixty days, although the treasurer of the savings bank thought he could get the money for the withdrawal within thirty days.

3. As a result of the informal meeting of the stockholders referred to in finding 2 a resolution was adopted at a formal meeting of the stockholders held January 16, 1933, which provided in so far as here material as follows:

> Resolved by the Stockholders in Annual Meeting assembled that the continued maintenance of a surplus as large as that shown by the treasurer's report is unnecessary, and we urge and recommend that the directors declare a dividend of not less than eighty per cent (80%).

On the same day plaintiff's board of directors adopted a resolution which read in part as follows:

> The following resolution presented to the Stockholders' Meeting was considered instruction to the directors to reduce the surplus: Resolved by the Stockholders in Annual Meeting assembled, that the continued maintenance of a Surplus as large as that shown by the treasurer's report is unnecessary, and we urge and recommend that the directors declare a dividend of not less than eighty per cent (80%). Voted: to declare a dividend of 80% payable soon as convenient.

The qualification as to the time of payment of the dividend was placed in the resolution entirely for the convenience of the savings bank.

At the time the above resolutions were adopted it was understood that the dividend of $39,200 should be paid by taking $18,000 out of the savings account and securing the balance by selling State of New Hampshire bonds in the amount of $20,000 and using a small amount from plaintiff's checking account, which was the plaintiff's working capital. The rules of the savings bank required ninety days' notice in writing when withdrawals were made which exceeded $1,000, but it was not the custom of that bank to enforce that rule.

4. The treasurer of the savings bank was also a stockholder of plaintiff and attended the stockholders' meeting of January 16, 1933. It was his policy not to accept extremely large deposits because the bank might be called upon at any time to permit their withdrawal, and in 1932 he asked plaintiff's president to reduce the size of plaintiff's deposit which was then much larger than it was in 1933. Plaintiff complied with that request.

The savings bank was given informal notice on January 17, 1933, of plaintiff's intention to withdraw $18,000 and because of that notice the trustees of the savings bank adopted the following resolution on January 17, 1933:

> Voted that William H. McCarten, Treasurer of the Siwooganock Guaranty Savings Bank of Lancaster, N. H., be and he is hereby authorized to sell the following securities belonging to said bank: Ten thousand dollars ($10,000) par value of Pacific Gas & Electric Co. 6% bonds due December 1, 1941, at 111 net or better; fifteen thousand dollars ($15,000) par value Consumers Power Company 5% bonds due November 1, 1952, at 106½ net or better.

The bonds were immediately sent by the savings bank to the Shawmut Bank in Boston for sale in accordance with the resolution. Sale at the price indicated would have resulted in a profit to the bank of approximately $3,200. At that time bond prices were dropping off and the bonds were not sold.

5. March 2, 1933, and before the funds were made available to plaintiff, a bank holiday was declared in New Hampshire, effective March 4, 1933. Because of the restrictions of the bank holiday the savings bank could not make the $18,000 available to plaintiff until October 10, 1933, when a meeting of the trustees authorized the payment of the $18,000 "promised them last January."

October 13, 1933, plaintiff sold the $20,000 State of New Hampshire bonds. These bonds were readily salable on the market at a premium but they were not sold before October as it was considered good business to hold them. Shortly thereafter plaintiff paid the extra dividend of 80 per cent ($39,200) referred to in the resolutions of January 16, 1933, quoted in finding 3.

6. It was the policy of plaintiff to declare a regular dividend of 6 per cent each January and an extra dividend of 6 per cent in April, although one year it was 8 per cent and another year 10 per cent. In 1923, 1926, and 1928, plaintiff paid extra dividends of 50 per cent. The 1923 extra dividend of 50 per cent in addition to the regular dividend of 6 per cent was voted January 1 and paid May 5, 1923, out of the proceeds of the sale of bonds. The 1928 extra dividend of 50 per cent was voted January 26 and paid April 3, 1928.

7. The Commissioner of Internal Revenue held that the extra dividend of 80 per cent ($39,200) paid as shown in finding 5 was subject to the 5 per cent tax imposed by Section 213 of the National Industrial Recovery Act. As a result of that ruling plaintiff was called upon to pay, and on July 14, 1936, did pay, a tax of $2,470.57.

July 29, 1936, plaintiff filed a claim for the refund of the foregoing payment of $2,470.57, plus interest, on the ground it was not liable for a tax on such dividends because the statute provided that—

> The tax imposed by the section shall not apply to dividends declared before the date of the enactment of this act [June 16, 1933].

The Commissioner duly rejected the claim for refund.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action to recover upon a claim for refund duly filed a tax of $2,470.57 paid on dividends.

On January 16, 1933, the plaintiff's board of directors voted "to declare a dividend of 80% payable soon as convenient." In order to obtain the cash to pay this dividend it was necessary for the plaintiff to withdraw a considerable amount of the money which it had on deposit in a savings bank and to sell some bonds. The payment of the dividend was not made until sometime in October 1933.

The tax upon dividends imposed by section 213 of the National Industrial Recovery Act (48 Stat. 195, 207) does not apply to—

(*a*) Dividends declared before midnight June 15, 1933.

It is urged on behalf of defendant that the dividend resolution was inconclusive and did not show that the dividend was actually declared. In support of this claim *United States* v. *Murine Co.*, 90 Fed. (2d) 549, is cited but in that case the language used with reference to the dividend was not definite or final. In the opinion a number of cases are cited showing that a declaration to pay dividends "is not invalid on account of language used which merely extends or makes uncertain the time of payment." The provision that the dividend was to be paid "soon as convenient" merely made the time of payment uncertain and did not invalidate the declaration of it which was expressly made. It follows that the tax upon the dividends was wrongfully collected.

Judgment will be rendered for plaintiff in the amount of $2,470.57 with interest as provided by law. It is so ordered.

Whaley, *Judge;* Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 6, 1937, to April 18, 1938

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43086. DECEMBER 6, 1937

The Union Club Company, A Corporation.

Refund of taxes on social club dues and initiation fees. Findings of fact and conclusion of law; petition dismissed on authority of *Army & Navy Club of America* v. *U. S.*, 72 C. Cls., 684; 53 Fed. (2) 277, et al.

No. M–178. DECEMBER 6, 1937

Bernard Greenbaum.

Refund of income tax. Plaintiff's motion for new trial overruled in so far as it pertains to tax for year 1924.

Order filed June 7, 1937, entering judgment for $705.10, vacated. New judgment entered for $948.45, with interest. Opinion, 84 C. Cls. 77.

No. 42659. DECEMBER 6, 1937

Barton Sewell, II.

Income tax; liability for tax on trust income. Judgment for $4,757.91, with interest. Opinion, 85 C. Cls. 512.

No. 43087. DECEMBER 6, 1937

Frank W. Halliday.

Pay of professor at U. S. Military Academy, with rank of lieutenant colonel. Findings of fact, conclusion of law, and judgment for plaintiff on authority of *Strong* v. *U. S.*, 60 C. Cls. 627, and *McNeil* v. *U. S.*, 64 C. Cls. 406.

Judgment entered on April 4, 1938, for $2,201.80.

No. 43094. JANUARY 12, 1938

Eli R. Pershing.

Rental allowances; Army officer, signal corps reserve; without dependents. Findings of fact, conclusion of law, and judgment for $295.30, on authority of *O'Mohundro* v. *U. S.*, 84 C. Cls. 362, and *Lee* v. *U. S.*, 84 C. Cls. 629.

No. 43328. FEBRUARY 7, 1938

Fidelity Trust Company.

Validity of special jurisdictional act; veto of President. Findings of fact and conclusion of law; petition dismissed on authority of *Wright* v. *U. S.*, decided February 8, 1937 (84 C. Cls. 630); and affirmed by the Supreme Court, January 17, 1938. (302 U. S. 583.)

No. M-399. FEBRUARY 7, 1938

Continental Illinois National Bank and Trust Company of Chicago and Ronald L. Tree, as surviving trustees under the Last Will and Testament of Lambert Tree, deceased.

Income tax; deduction of cost of buildings demolished under terms of lease, etc. In accordance with its opinion of February 8, 1937, in the case, 84 C. Cls. 405, the Court rendered judgment for plaintiffs in the sum of $4,403.45 with interest thereon from November 6, 1929, as provided by law.

Defendant's request that the case be referred to a commissioner for the purpose of taking further testimony overruled.

No. 42129. FEBRUARY 7, 1938

John Sherman Hoyt, Executor, Estate of Henry R. Hoyt.

Estate tax; claim for refunds. In accordance with its opinion of December 6, 1937, in the case, *ante*, p. 19, the Court rendered judgment for the plaintiff in the sum of $98,562.12, with interest thereon as provided by law.

No. 43120. FEBRUARY 7, 1938

Robert R. Coleman.

Rental allowances; officer in Army Reserve, medical corps, on duty with Civilian Conservation Corps. Findings of

fact, and conclusion of law; plaintiff entitled to recover for period from October 21, 1933, to December 20, 1933. Judgment entered on April 4, 1938, on report from General Accounting Office, for $102.

Petition dismissed as to claim for period from December 20, 1933, to April 11, 1934.

O'Monundro v. *U. S.*, 84 C. Cls., 362.

No. 42477. MARCH 7, 1938

LePage Cronmiller.

Rental allowance; second lieutenant, U. S. Marine Corps, without dependents; on duty as captain, Nicaraguan National Guard; serving without troops. Findings of fact and conclusion of law, and judgment for plaintiff in the amount of $954.67 on authority of *Beadle* v. *U. S.*, 72 C. Cls. 310, and *Hogaboom* v. *U. S.*, herein, page 537.

No. 42478. MARCH 7, 1938

Jaime Sabater.

Rental allowance; second lieutenant, U. S. Marine Corps, without dependents; on duty as first lieutenant, Nicaraguan National Guard; serving without troops. Findings of fact, and conclusion of law, and judgment for plaintiff in the amount of $833.33, on authority of *Beadle* v. *U. S.*, 72 C. Cls. 310, and *Hogaboom* v. *U. S.*, herein, page 537.

No. 43005. MARCH 7, 1938

St. Nicholas Club of the City of New York.

Internal Revenue; tax on club dues and initiation fees. Findings of fact and conclusion of law; petition dismissed on authority of *Chicago Engineers Club* v. *U. S.*, 80 C. Cls. 615. See also *Transportation Club of San Francisco* v. *U. S.*, 84 C. Cls. 253; *Detroit Club* v. *U. S.*, herein, page 549.

No. 42521. MARCH 7, 1938

The Union Club of Hoboken.

Internal Revenue; tax on club dues and initiation fees. Findings of fact and conclusion of law; petition dismissed on authority of *Army & Navy Club of America* v. *U. S.*,

72 C. Cls. 684 (certiorari denied 285 U. S., 548); *Chicago Engineers Club* v. *U. S.*, 80 C. Cls. 615. See also *Detroit Club* v. *U. S.*, herein, page 549.

No. 43181. APRIL 4, 1938

Mabel S. Andrews, executrix of Estate of Matthew Andrews, deceased.

Income tax; amendment of refund claim after statute of limitations has run. Opinion, 84 C. Cls. 460. Dismissed on mandate of the Supreme Court reversing the Court of Claims, 302 U. S. 517. See p. 762, *post*.

No. 42852. APRIL 6, 1938

George J. Mellinger, et al.

Income tax; note accepted for interest due. Judgment for $7,165.80, with interest. Findings of fact and opinion, *ante* page 272.

COMMUTATION FOR QUARTERS, MARINE CORPS SERVICE IN CHINA

In the following cases involving claims to recover rental allowances while serving with the Marine Corps in China, on stipulations by the parties, and in accordance with reports from the General Accounting Office as to the periods and amounts involved, judgments against the Government were rendered as indicated, on authority of *Montague* v. *U. S.*, 79 C. Cls. 624, and *Bartholomew* v. *U. S.*, 84 C. Cls. 631:

APRIL 6, 1938

M-244. Charles T. Brooks, from June 13, 1927, to May 7, 1928, $650.00.

43661. Robert S. Williams, from September 10, 1932, to February 25, 1935, $762.87.

43662. Robert L. Denig, Jr., from June 26, 1933, to August 16, 1935, $661.00.

43691. Paul D. Sherman, from January 6, 1933, to March 12, 1935, $656.00.

43805. Marvin V. Yandle, from June 9, 1932, to December 21, 1934, $1,634.90.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, judgments against the Government were rendered as indicated, pursuant to the stipulation filed in the case of *Rose City Cotton Oil Mill* v. *U. S.*, Congressional No. 17341 (and all other pending cotton linter cases as per list attached to said stipulation), filed February 7, 1938, and on authority of *Farmers & Ginners Cotton Oil Co.* v. *U. S.*, 76 C. Cls. 294, following *Hazelhurst Oil Mill & Fertilizer Co.* v. *U. S.*, 70 C. Cls. 334, and *Hartsville Oil Mill* v. *U. S.*, 271 U. S. 43.

DECEMBER 14, 1937

No. 17366, Congressional. National Cotton Oil Company, to the use of Ernest Lamar, $5,722.30.

No. 17436, Congressional. Caddo Cotton Oil Company, to the use of W. F. Taylor, Inc. $2,404.88.

MARCH 7, 1938

No. D–1098. Pine Level Oil Mill Co., $1,386.12.

No. D–1099. R. B. Jones, receiver of Planters Cotton Oil Company, $6,852.80.

No. D–1107. Farmers Cotton Oil & Fertilizer Company, to the use of Percy Underwood, $2,566.82.

No. 17363, Congressional. Huntsville Warehouse Company, $380.17.

No. 17370, Congressional. Sulligent Cotton Oil Company, $1,714.23.

No. 17467, Congressional. Planters Oil Mill, $1,190.74.

No. 17484, Congressional. Robeson Manufacturing Company, $2,593.68.

No. 17591, Congressional. Marshall Cotton Oil Company, $1,397.98.

APRIL 4, 1938

No. D–1074. Sudie P. Torbert, Pauline Torbert Daniels, and C. L. Torbert, sole heirs of L. L. Torbert, deceased, formerly trading as LaFayette Cotton Oil Mills, $504.37.

No. 17411, Congressional. Thomas J. Glover and R. O. Jones, liquidators of the Coweta Cotton Oil Company, $2,352.74.

No. 17422, Congressional. Villa Rica Cotton Oil Company, Villa Rica Mills, Inc., Successor, $893.25.

No. 17479, Congressional. Eastern Cotton Oil Company (Elizabeth City Plant), to the use of Eastern Fertilizer Corporation, $1,667.66.

No. 17529, Congressional. D. M. Lipscomb, sole surviving trustee of Ninety-Six Oil Mill, $5,842.76.

No. 17566, Congressional. Flatonia Oil Mill Company (Mrs. J. J. Kolar, trading as), $351.35.

No. 17593, Congressional. Munger Oil & Cotton Company (Mexia, Texas, plant), $5,047.41.

No. 17611, Congressional. Munger Oil & Cotton Company (Teague, Texas, plant), $871.18.

No. 17624, Congressional. Munger Oil & Cotton Company (Wortham, Texas, plant), $751.83.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON DECEMBER 6, 1937

42893. Merchants & Farmers Bank.
42928. Interlaken Mills.

ON JANUARY 12, 1938

43274. The Western Shade Cloth Co.
43551. Clara J. Robertson et al.
43605. The Blumer Company.

ON FEBRUARY 7, 1938

43089. Sellmayer Packing Company, on demurrer.
43508. Irene Washington Esselin.

ON MARCH 7, 1938

M–389. The Newport Company.
42375. The National Cash Register Co.
42687. Edna L. McNaghten.
42690. Gladys Janss Pollock.
42691. Arthur Letts, Jr.
42703. The Central Trust Co., Trustee.
42704. Mary B. Moores.
42705. Harriot R. Coney.
42706. Emily M. Groff.
42707. John Moores.
42708. William H. Moores.
42709. William H. Moores, Admr.
42892. Robert Reiss & Co.
43404. J. F. Darby.
43751. United Steam Navigation Co., Ltd.

ON APRIL 4, 1938

42603. Marion S. Smith.
43567. Lehn and Fink Products Corp.

Cases Involving Pay and Allowances

ON DECEMBER 6, 1937

41868. Arthur W. Ellis.
42360. James L. Hall.
42938. Beriah M. Thompson.

Cases Involving Infringement of Patents

ON JANUARY 12, 1938

43402. Reliance Steel Products Co.

ON FEBRUARY 7, 1938

43184. United States Ordnance Co.

Cases Involving Difference in Value of Gold

ON JANUARY 12, 1938

43202. Gertrude H. Gavin.
43203. Gertrude H. Gavin.
43204. Roland L. Redmond.
43205. Lewis Cass Ledyard, Jr., et al.
43212. James S. Kemper, et al.
43213. Lumberman's Mutual Casualty Co.
43208. Schuyler L. Black.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED, v. THE UNITED STATES

[No. 43234. Decided May 3, 1937. 85 C. Cls. 318]

THE DIXIE TERMINAL CO. v. THE UNITED STATES

[No. 42948. Decided November 9, 1936. 83 C. Cls. 656]

[Certiorari. 301 U. S. 679, 680]

[*Affirmed*, December 13, 1937. 302 U. S. 329]

Certiorari to review judgments in three suits against the United States to recover on interest coupons attached to Government bonds, containing the gold clause, which had been called for redemption. In the above two cases, the Court of Claims dismissed the claims. In the third case, (*United States* v. *Machen*, 87 Fed. (2nd) 594) the District Court gave judgment for the United States, which was reversed by the Circuit Court of Appeals. In the first two cases the plaintiffs had presented their bonds to the Treasurer of the United States and demanded payment in gold dollars each of 25.8 grains of gold $\frac{9}{10}$ths fine, and declined a tender in coin or currency other than gold or gold certificates. They had then demanded, unsuccessfully, that coupons for interest periods subsequent to the date fixed in the calls for redemption of the bonds be paid either in gold or in legal tender currency. Their suits were for the

amounts of the coupons in current dollars. In the *Machen* case, the situation was similar. There had been no presentation of the bond or coupon for payment, but it was stipulated that the Treasurer of the United States and other fiscal agents had not at any time been directed by the Secretary of the Treasury to redeem the bonds in gold coin, but had been authorized and directed to redeem in legal tender currency; also that there was a refusal to pay similar coupons for interest accruing after the date of redemption.

The Supreme Court held that the three cases presented a single question: "Was a notice of call issued by the Secretary of the Treasury for the redemption of Liberty Loan bonds effective to terminate the running of interest on the bonds from the designated redemption date?"

The judgment of the Court of Claims was affirmed, the Supreme Court deciding:

1. Bonds of the United States promising payment of principal and interest in United States gold coin of the standard of value in force at the time of their issuance (25.8 grains of gold 9/10ths fine per dollar) were called by the Secretary of the Treasury for redemption and payment prior to their stated day of maturity, pursuant to provisions therein which reserved this right to the United States to be exercised through a published notice, and which declared that from the date of redemption designated in such notice interest on the called bonds should cease and all coupons thereon maturing after that date should be void. Prior to the notices, the Joint Resolution of June 5, 1933, providing for the discharge of "gold clause" obligations upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for private debts, had been adopted; and in two of the cases the notices were later than the decisions of this Court in the *Gold Clause Cases*, including *Perry* v. *United States*, 294 U. S. 330.

Held:

(1) That the effect of the published notice was to accelerate the maturity of the bonds, the new date specified in the notice supplanting the old one stated in the bonds as if there from the beginning.

(2) Holders of the bonds had no claim against the United States on interest coupons covering a period subsequent to the new date, since by the terms of the bonds interest ceased to run on that date.

In the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in payment of the

principal. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution.

(3) The proposition that the notices of call were void, upon the ground that they must be read with the Joint Resolution of June 5, 1933, and, thus supplemented, promised payment different from that promised by the bonds, can not be maintained.

The notices of call were not promises, and did not commit the Government, either expressly or by indirection, to a forbidden medium of payment. Notice that the bonds were called for redemption on the specified date implied that at that accelerated maturity the bondholders would be entitled to payment of principal and accrued interest in such form and measure as would discharge the obligation in accordance with the Constitution, statutes and any controlling decisions.

The contention that the existence of the Joint Resolution, *supra*, amounted to an anticipatory breach, is examined and rejected. The doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to contracts for the payment of money only. Moreover, an anticipatory breach, if it were made out, could have no effect upon the right of the complaining bondholders to postpone the time of payment to the date of natural maturity. The Government was not subject to a duty to keep the content of the dollar constant during the period intervening between promise and performance. The duty of the Government was to pay the bonds when due.

The fact that the statutory provisions for payment in any legal tender remained unrepealed did not affect the date of maturity as accelerated by the notices.

(4) No question of constitutional law, nor of fraud, is involved in the decision of these cases.

(5) The Secretary of the Treasury did not exceed his lawful powers by issuing the calls without further authority from the Congress than was conferred by the statutes under which the bonds were issued.

2. The Act of March 18, 1869 (R. S. Sec. 3693; 16 Stat. 1), which in its day placed restrictions upon the redemption by the Government of interest-bearing bonds, was for the protection of holders of United States obligations not bearing interest, the "greenbacks" of that era. Upon the resumption of specie payments in 1879 the aim of the statute was achieved, and its restrictions are no longer binding.

302 U. S., 329.

Opinion of the Court by Mr. Justice Cardozo, announced by the Chief Justice.

Mr. Justice Stone, in a separate opinion, concurred in the result.

Dissenting: Mr. Justice McReynolds, Mr. Justice Sutherland, and Mr. Justice Butler.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED, v. THE UNITED STATES

[No. 43181. Decided February 8, 1937, 84 C. Cls. 460]

[*Reversed* January 3, 1938. 302 U. S., 517]

[Petition dismissed April 4, 1938, ante, p. 754]

Certiorari to review a judgment of the Court of Claims sustaining a claim based upon an overpayment of income tax.

The judgment of the court was reversed, January 3, 1938, the Supreme Court deciding:

1. The taxpayer made timely claim for overpayment of income tax due to failure in the return to deduct for loss on worthless shares of certain corporations. After expiration of the two year limitation (Revenue Act of 1928), he sought to amend by including another overpayment for the same year which resulted from returning as dividends payments received from another corporation, which were not dividends and should have been reported as giving rise to a capital gain, of less amount. *Held:*

    (1) That the second claim was not properly an amendment of the first, but a separate claim on a new and unrelated ground, and was barred by the statute.

    (2) The fact that the first claim, though for a specific transaction, contained also a "general relief" demand for any other or greater sum which might be found due to the taxpayer, could not justify the amendment.

    (3) Neither could it be upheld because the Commissioner, before the statute ran, had learned from the corporation which had made the payments that they were not dividends but the proceeds of a sale of shares owned by the taxpayer, and had so informed the revenue agent, it not appearing that, prior to the attempted amendment, the Commissioner knew that the taxpayer was a shareholder in that company or knew that the reported receipt of dividends had reference to such payments.

2. In deciding whether a tax-refund claim is subject to an amendment, the analogies of pleading are helpful, but they will not be so followed as to ignore the necessities and realities of administrative procedure.

   A claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to such relief, can not be amended to discard that basis and invoke action requiring examination of matters previously not germane.

302 U. S. 517.

Mr. Justice Roberts delivered the opinion of the Court.

THE CREEK NATION, PETITIONER, v. THE UNITED STATES

[No. F-205. Decided November 9, 1936, on order of remand by the Supreme Court. Motion for new trial overruled May 3, 1937. 84 C. Cls. 12]

Certiorari to review a judgment of the Court of Claims deciding there was due the plaintiff the sum of $22,409.89 on its petition, and due the Government $76,805.51 on its counterclaim (84 C. Cls. 12) and that plaintiff was therefore not entitled to judgment in any amount.

The judgment of the Court of Claims was *reversed*, and the case *remanded* for further proceedings, January 17, 1938 (302 U. S. 620).

The court, on March 13, 1933, made special findings of fact, upon which it was decided, as a conclusion of law that the Creek Nation was entitled to recover the sum of $163,-628.70, the value of 5,454.29 acres of the land involved; the amount being based on the value of the lands as of the date of the filing of the plaintiff's petition. It was also found by the court that the defendant upon its counterclaim was entitled to recover from the plaintiff the sum of $76,805.51, and judgment was entered for the plaintiff for the difference, or $86,823.19 (77 C. Cls. 159).

The Supreme Court, upon the defendant's application, granted certiorari and upon a review of the case (295 U. S., 103) reversed the decision of the Court of Claims upon the single point respecting the date as of which the value of

the lands taken should be ascertained. Whereupon, on the rehearing of the case, the Court of Claims, interpreted the opinion of the Supreme Court to the effect that "compensation should be based on the value at that time" as referring to the act of 1891, and held therefore that the compensation of plaintiff "must, under the Court's decision, be based on the value of the lands as of the date of the approval of that act, February 13, 1891," and upon additional findings of fact fixed the compensation to be awarded plaintiff at $22,409.89, but since the amount of the counterclaim was in excess of the amount of compensation held to be due plaintiff, the petition was dismissed.

The Supreme Court (January 17, 1938) reversed the judgment of the Court of Claims and remanded the cause for further proceedings in conformity with the opinion of the Supreme Court, holding:

> The court below has misinterpreted that decision (295 U. S., 103). The act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposal of the lands to adverse holders constituted the taking by the United States. The petitioner is entitled to the present full equivalent of the value of the lands, without improvements, as of the date of the patents of the various parcels, if, as we assume, the patent in each instance issued promptly after the delivery of the final certificate; but if a substantial interval elapsed between the date of certificate and of patent, then as of the date of the certificate. A fair approximation or average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract.

Mr. Justice Roberts delivered the opinion of the court.

DAVID A. WRIGHT, PETITIONER, v. THE UNITED STATES

[No. A-261. Decided February 8, 1937. 84 C. Cls. 630]

Certiorari to review judgment of the Court of Claims denying plaintiff's petition for reinstatement.

The Court of Claims decided (84 C. Cls., 630) that the special jurisdictional act, (Senate Bill 713, 74th Congress, 1st session) for reinstatement and rehearing of an adjudi-

cated case, did not become a law, having been vetoed by the President, and the plaintiff's petition for reinstatement was accordingly denied.

The judgment of the Court of Claims was *affirmed*, January 17, 1938 (302 U. S., 583), the Supreme Court holding:

The bill was presented to the President of the United States on Friday, April 24, 1936. It had originated in the Senate. On Monday, May 4, 1936, the Senate took a recess until noon, Thursday, May 7, 1936. The House of Representatives remained in session. On May 5, 1936, the President returned the bill with a message addressed to the Senate setting forth his objections. The bill and message were delivered to the Secretary of the Senate. When the Senate reconvened on May 7, 1936, the Secretary, by letter to the President of the Senate, advised the Senate of the return of the bill and the delivery of the President's message. On the same day the President of the Senate laid before the Senate the Secretary's letter and the message of the President of the United States. The message was read and with the bill was referred to the Senate Committee on Claims. No further action was taken.

The bill granted jurisdiction to the Court of Claims to rehear and readjudicate petitioner's claim against the United States. Accordingly, on September 4, 1936, petitioner presented his petition for reinstatement, which was denied on the ground that the bill had never become a law. In view of the importance of the question certiorari was granted (301 U. S., 681).

The applicable provisions of the Constitution, Article 1, Section 7, paragraph 2, are quoted.

1. The first question is whether "the Congress by their adjournment" prevented the return of the bill by the President within the period of ten days allowed for that purpose; the Supreme Court holding that "The Congress" did not adjourn; the Senate alone being in recess and the Constitution creating and defining "the Congress" as consisting "of a Senate and a House." The Senate is not the Congress.

2. The recess of the Senate from May 4th to May 7th was during the session of Congress; and in returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution; the Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies.

3. The decision in the *Pocket Veto Case* (279 U. S., 655) is differentiated as not applicable for two reasons: (1) the present question was not involved, and (2) the reasoning of the decision is inapposite to the circumstances of this case.

4. The constitutional provisions have two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes; a construction which would frustrate either of these purposes should not be adopted.

Held: "That where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the Bill with his objections to the appropriate officer of the House within the prescribed ten days and the Congress does not pass the bill over his objections by the requisite votes. In this instance the bill was properly returned by the President, it was open to reconsideration in Congress, and it did not become a law."

Mr. Chief Justice Hughes delivered the opinion of the court.

Mr. Justice Stone delivered a separate opinion, in which Mr. Justice Brandeis concurred, holding:

That "the legislation now in question did not become a law, not, as the Court holds, because the bill vetoed by the President was returned to the Senate within the ten-day period or to any person authorized to receive the bill in its behalf, but because the Senate by its adjournment prevented the return and thus called into operation the provision that the bill 'shall not be a law' where adjournment prevents its return to the house in which it originated, within the ten days allowed to the President to sign or disapprove it."

THE UNITED STATES, PETITIONER, v. ROBERT ESNAULT-PELTERIE

[No. D-388. Decided April 5, 1937, on order of remand by the Supreme Court. Findings of fact amended April 20, 1937. 84 C. Cls. 625]

Certiorari to review a judgment of the Court of Claims that plaintiff's patent is valid and has been infringed by the United States and that he is entitled to compensation therefor under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705), and section 155 of the Judicial Code.

The judgment of the Court of Claims was *affirmed*, January 31, 1938 (303 U. S., 26), in an opinion *per curiam*, stating:

Respondent (plaintiff) brought this suit to recover compensation for the use and manufacture by and for the United States of a device alleged to be covered by respondent's patent No. 1,115,795 for an invention for the control of the equilibrium of airplanes. On the first hearing the Court of Claims made special findings of fact and decided as a conclusion of law that respondent's patent was valid and had been infringed by the United States and that respondent was entitled to compensation (81 C. Cls. 785). On review by certiorari the Supreme Court held that validity and infringement were ultimate facts to be found by the Court of Claims, and as these facts had not been found, the judgment was vacated and the case was remanded to the Court of Claims with instructions to find specifically whether respondent's patent was valid and, if so, whether it had been infringed (299 U. S. 201).

The parties then moved in the Court of Claims for additional findings and the Court amended its special findings by adding the following findings of facts:

XLVIII. Claims 2, 5, 6, 7, 8, and 9 of the Esnault-Pelterie patent in suit are valid.

XLIX. The three alleged infringing airplanes of the defendant all possess the single vertical lever movable in every direction for controlling the lateral or longitudinal equilibrium of the airplane, connected to equivalent controlling surfaces having the same functional effects as those disclosed in the patent.

Claims 2, 5, 6, 7, 8, and 9 of the Esnault-Pelterie patent in suit are infringed (84 C. Cls. 625).

The Court of Claims then entered an interlocutory judgment holding respondent entitled to compensation and directing that the court's previous findings, as amended, together with its opinion as theretofore announced, should stand.

Held:

Review by the Supreme Court of the judgment in such a suit is subject to the rules which have been established by Congress for the review of the judgments of the Court of Claims; that review being limited to questions of law.

In a patent case in the Court of Claims under the Act of 1910 (36 Stat. 251) the questions of validity and infringement are questions of fact. The requirement that the Court of Claims should find the ultimate facts which are controlling, places upon that court the duty of resolving conflicting inferences and to draw from the evidence the necessary conclusions of fact (*U. S.* v. *Adams*, 6 Wall. 101, 112).

The Supreme Court would not be justified in taking up the patents set forth in the findings, and, in the absence of the explanatory and construing testimony of the expert witnesses with respect to the pertinent fact situations, in attempting to pass upon the various questions, whether of a scientific nature or otherwise, that are involved and upon such a necessarily limited consideration in overruling the conclusions of fact reached by the Court of Claims upon the entire record. (*Bischoff* v. *Wethered*, 9 Wall 812, and kindred cases cited).

BENJAMIN B. FOSTER AND ROBERT R. TODD, EXECUTORS OF THE ESTATE OF ANNA FOSTER FORD, DECEASED, PETITIONERS, v. THE UNITED STATES

[No. 42642. Decided December 7, 1936. Motion for new trial overruled, with opinion, April 5, 1937. 84 C. Cls. 193]

Certiorari to review a judgment of the Court of Claims dismissing the petition of plaintiff for refund of income tax.

The judgment of the Court was *affirmed*, January 31, 1938 (303 U. S., 118) the Supreme Court stating:

Petitioners' right (as executors) to an income tax refund depends upon whether a dividend paid by the Foster Lumber Company in 1930 is tax exempt as representing corporate earnings accumulated before March 1, 1913. This dividend is taxable under the Revenue Act of 1928 (45 Stat. 791) if paid from earnings accumulated after 1913.

Petitioners contend that the 1930 dividend was traceable to the Company's pre-1913 accumulations because its post-1913 earnings had been exhausted by a distribution in 1929.

Held:

1. That the transaction under which the Foster Company in 1929 paid $1,025,000 cash for its own stock of $50,000 par value does not fall within Subsections (a) and (b) of Section 115 of the Act of 1928; its character and effect are determined by Subsections (c) and (h), which relate to distributions in complete or partial liquidation.

2. Earnings of a corporation accumulated prior to 1913, under decisions of the court prior to even the 1924 Revenue Act, are to be considered capital; (*So. Pac. Co.* v. *Lowe*, 247 U. S. 335, et al.) and in the light of these decisions Con-

gress in the Revenue Act of 1928, as well as 1924, obviously intended that corporate funds distributed under the circumstances shown in this case should be "chargeable to capital account" and that stock purchases of the type here involved should not be considered "for the purpose of determining the taxability of subsequent distributions by the corporation."

3. Acceptance of petitioners' contention would permit corporate profits accumulated since March, 1913, to escape taxation contrary to the provisions and purpose of the 1928 revenue act. The bookkeeping mingling of corporate earnings and profits made before and after March 1, 1913, does not alter the act nor can such action render taxable profits non-taxable. The distribution of $1,025,000 was "properly chargeable to capital account" and was not paid out of profits earned since March 1, 1913.

Mr. Justice Black delivered the opinion of the court.

THE UNITED STATES, APPELLANT, v. THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS.

[No. E-346. Decided June 7, 1937. 85 C. Cls. 451]

Certiorari to review a judgment of the Court of Claims allowing certain claims of the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians against the United States for the value of reservation lands taken by the Government, with offset; judgment for $5,313,347.32 with interest (85 C. Cls. 451).

The judgment of the Court was *affirmed*, April 25, 1938, the Supreme Court holding:

1. The tract of timber taken by the Government was a part of the reservation retained by plaintiffs out of the country held by them in immemorial possession; the worth attributable to the timber was a part of the value of the land upon which it was standing, and the value of the timber was properly included as a part of the compensation for the lands taken (*U. S.* v. *Shoshone Tribe*, decided same day.
2. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the

full equivalent of that value paid contemporaneously with the taking. (*Jacobs* v. *U. S.*, 290 U. S. 13, 16–17, and cases cited); and interest was properly included in the findings.

3. The tract involved (87,000 acres) was not "lost by mistake" as contended by the Government; Congress had power to direct the exchange which was made and for that purpose to authorize the expropriation of plaintiffs' lands; it was a valid exertion of sovereign power and implied a promise to pay just compensation.
4. The 87,000 acres were taken pursuant to the Act of 1906 (34 Stat. 325); the taking was ratified by appropriation and payment under the Act of 1908 (35 Stat. 70); it implied a promise to pay just compensation; and the lands in question were not "wrongfully appropriated" in the contemplation of the Act of 1920 (41 Stat. 623).
5. Congress, by the Act of May 15, 1936 (49 Stat. 1276), specifically directed the Court of Claims to determine the claims of plaintiffs on the merits and to enter judgment thereon "upon the present pleadings, evidence and findings of fact"; and unquestionably the findings of fact are sufficient to sustain the judgment.

Mr. Justice Butler delivered the opinion of the court.

THE UNITED STATES, PETITIONER, v. SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING

[No. H–219. Decided June 1, 1937. 85 C. Cls. 331]

Certiorari to review a judgment of the Court of Claims, upon mandate of the Supreme Court, allowing certain claims of the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming against the United States for the value of tribal lands taken by the Government, with offset; judgment for $4,408,444.23, with interest (85 C. Cls. 331).

The judgment of the Court of Claims was *affirmed*, April 25, 1938, the Supreme Court holding:

1. The sole question for decision is whether the Court of Claims erred in holding that the right of the tribe to the lands in question included the timber and mineral resources within the reservation, a part of which was taken by the United States by putting upon it, without the tribe's consent, a band of Arapahoe Indians.

2. In this case the Supreme Court had previously held (299 U. S. 476, 484) that the tribe had the right of occupancy with all its beneficial incidents; this right being the primary one and as sacred as the fee, and division by the United States of the Shoshones' right with the Arapahoes was an appropriation of the land *pro tanto;* that although the United States had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would not be the exercise of guardianship or management but confiscation.
3. Under the treaty with the Shoshones, the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself.
4. The treaty, made with knowledge that there were mineral deposits and standing timber in the reservation, contains no reservation of any beneficial interest in them. Doubts, if any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe, as transactions between a guardian and his wards are to be construed favorably to the ward.
5. Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title.
6. *United States* v. *Cook* (19 Wall. 591) gives no support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded; that question was not therein adjudicated.

Mr. Justice Butler delivered the opinion of the court; Mr. Justice Reed dissenting.

MEURER STEEL BARREL COMPANY, INC. v. THE UNITED STATES

[No. C–1278]

[85 C. Cls. 554; 302 U. S. 754]

Petition for writ of certiorari *denied* by the Supreme Court, December 6, 1937.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR FOR THE SOUTHERN SURETY COMPANY OF NEW YORK, A CORPORATION, v. THE UNITED STATES

[No. 43351]

[85 C. Cls. 121; 303 U. S. 642]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

DON C. BOTHWELL AND GEORGE N. DAVIS, AS RECEIVERS OF THE MAGNA OIL & REFINING CO., A CORPORATION DISSOLVED, v. THE UNITED STATES

[No. 42812]

[85 C. Cls. 150; 303 U. S. 645]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

MIDDLE STATES PETROLEUM CORPORATION v. THE UNITED STATES

[No. 42714]

[85 C. Cls. 232; 303 U. S. 645]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

THEODORE S. WILKINSON v. THE UNITED STATES

[No. 43352]

[85 C. Cls. 329; 303 U. S. 643]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

CHESSBOROUGH JAMES HENRY KING MACKENZIE-KENNEDY v. THE UNITED STATES

[No. 42491]

[85 C. Cls. 405; 303 U. S. 646]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

AUGUST H. MORAN, RECEIVER OF WARDMAN CORP. (INC.) v. THE UNITED STATES

[No. 41901]

[85 C. Cls. 492; 303 U. S. 643]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

ERNEST M. BULL, SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED, v. THE UNITED STATES

[No. L-383]

[84 C. Cls. 632; 303 U. S. 645]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1938.

INTERNATIONAL MANUFACTURERS SALES COMPANY OF AMERICA, INC., A. S. POSTNOKOFF, TRUSTEE, v. THE UNITED STATES

[No. 43430]

[85 C. Cls. 683; 303 U. S. 651]

Petition for writ of certiorari *denied* by the Supreme Court March 14, 1938.

ALLEN POPE v. THE UNITED STATES

[No. K–366]

[Ante, p. 18; 81 C. Cls. 658; 76 C. Cls. 64; 303 U. S. 654]

Petition for writ of certiorari *denied* by the Supreme Court March 28, 1938.

WHARTON GREEN & CO., INC., A CORPORATION EXISTING UNDER THE LAWS OF THE STATE OF NEW YORK, v. THE UNITED STATES

[No. 42894]

[Ante, p. 100; 303 U. S. 661]

Petition for writ of certiorari *denied* by the Supreme Court April 4, 1938.

INDEX DIGEST

CONTRACTS—Continued.

X. Where tribal contract provided in substance that any advance in stumpage rates to be paid by contractor (plaintiff and its predecessors) should not exceed fifty per cent of the increase in average mill run wholesale net value of lumber at mills during the three years preceding, and evidence shows there was no such increase in mill prices, an increase in stumpage prices under the contract was without authority. *Forest Lumber Co.*, 188.

XI. Where both parties to contract previously had "put a practical interpretation upon the contract at variance with its terms"; and where the Commissioner of Indian Affairs had, in the exercise of his discretion, declined to make an increase in stumpage prices for a prior period when he had authority to do so, it was not a valid exercise of discretion to make an increase in a later period, contrary to the limitations of the contract. *Id.*

XII. Where contract recited it was made by the Superintendent of the Klamath Indian School, for and on behalf of the tribe, and purchaser agreed to make payment to said Superintendent "for the use and benefit" of the tribe, said Superintendent was acting, by authority of law, for the Government; and the Government was acting under its own rights and powers, and not as agent; and the contract is a contract of the Government within the meaning of Section 145 of the Judicial Code. *Id.*

XIII. Where officers of the Army informed plaintiff by customary form of letter that plaintiff would be fully and fairly compensated if use were made of any of plaintiff's inventions, offered to the Government, there was no express contract between plaintiff and the United States; said officers having authority to negotiate but not to contract. *Beach* v. *U. S.*, 226 U. S. 243, 260. *The Curved Electrotype Plate Co.* v. *U. S.*, 50 C. Cls. 258, 273. *W. C. Wright*, 290.

XIV. The words "in any approved manner," when used without other limiting expressions with reference to performance of work, are construed to mean "sanctioned" or "endorsed" generally by those skilled in the business or occupation, and not approved by one party to the contract. *Orleans Dredging Co.*, 404.

XV. Where the words "more or less" are used in the contract following directly after the figures stating the yardage to be moved and placed, the contract is not limited to the exact amount stated, and contractor is held to be entitled to be paid for all the work done under the contract. *Id.*

CONTRACTS—Continued.

XXIII. Where extra work, which is clearly within the meaning of the specifications, was ordered by the engineer in charge, and performed, plaintiff is held to be entitled to recover. *Id.*

XXIV. Where under the contract the plaintiff was required to transport the cement, furnished by the Government, for the work, and it was discovered that excess cement had been used, which fact was admitted by the Government, it is held that plaintiff is entitled to recover the total excess cost based on the number of sacks used. *Id.*

XXV. Alterations made without consent of plaintiff, held not binding upon him under circumstances of case. *Gormley*, 523.

XXVI. Where contract with the Government has been reduced to writing, and signed by the contracting parties, and work in accordance with its terms has been commenced, it is held that it was intended and understood that the contract was in full force and effect. *Id.*

XXVII. Where the Government notified contractor by letter of proposed changes in contract, and no reply was made, it is not material whether or not letter was received. *Id.*

XXVIII. Where, on showing made by contractor, it was found that unusual conditions not set forth in the contract, did exist and on that account the Government consented to changes in the price to be paid per cubic yard for excavation, it is held that the change in price per cubic yard was intended to apply to all the work performed under the contract, and the contractor was entitled to the increased rate of pay from the beginning of the work. *General Contracting Co.*, 562.

XXIX. Where on account of heavy preparatory expenses contractor requested, received and accepted a preliminary payment at the original unit rate in the contract, it is held that contractor is not thereby estopped from claiming the additional amount by implied acquiescense. *Joice* v. *U. S.*, 51 C. Cls. 439 and *Southern Pacific* v. *U. S.*, 268 U. S. 263 distinguished. *Id.*

XXX. Where plaintiff in January, 1933, acquired $2,500 in gold coins of the United States, and not holding a Federal license to hold or deal in gold coin, thereafter in March, 1934, delivered such gold coins to the Government, in accordance with an alleged agreement with the United States District Attorney to discontinue a

I. The provisions of the treaty of 1868 between the Government and the plaintiff tribe of Indians for furnishing by the Government cows and oxen to families of the tribe who removed to the reservation, selected tracts of land and commenced farming, did not obligate the Government for an indefinite period, but only for a reasonable time. *Sioux Tribe*, 299.

II. In the instant case it is held that the plaintiffs' claim for additional compensation for 621,824 acres of land, ceded to the defendant, on the ground that the payment therefor was inadequate, does not come within the jurisdictional act, the agreement of 1901 and the release executed thereunder having accomplished a complete settlement of all claims of plaintiffs arising out of that transaction. *Klamath and Moadoc Tribes et al.* v. *U. S.*, 81 C. Cls. 79, affirmed by the Supreme Court, 296 U. S. 244. *Klamath et al.*, 614.

III. It is held that the remaining claims as to the alleged exclusion of an additional 805,400 acres, based on the alleged breach of the 1864 treaty by the defendant, come within the special jurisdictional act; however, the report of Boundary Commission, made in 1896, is held to have been painstaking and thorough and in substantial conformity with the understanding of the Indians as to the boundaries, and said report was not only not contested but its ratification by Congress was urged by the Indians. *Id.*

IV. Testimony of aged Indians as to their recollections concerning the boundaries, based on what they remember to have heard in their childhood, is held to be without probative value. *Id.*

TAXES.

I. Where a special type of transmission is primarily designed and adapted for use in connection with an automobile engine, and was in fact used in some instances as a part of an automobile or truck, it does not necessarily follow that such transmission is an automobile part or accessory, under the regulations of the Internal Revenue Department, and in order to make the part taxable it must, under the regulations, be designed for the special purpose of being used as, or to replace, a component part of an automobile. *Universal Battery Co.* v. *U. S.*, 281 U. S. 580, 583; *Milwaukee Motor Products Co.* v. *U. S.*, 66 C. Cls. 295, 302. *Ekstrom*, 1.

II. Where written statements concerning items of claims against an estate and concerning expenses of administration have been filed within the required four-year period after payment of tax, there was no fatal departure from requirement of the statute relating to claims for refund and no material departure from requirements and procedure of the Bureau's rules and regulations, although such claims were not filed upon printed Treasury Form 843. *Hoyt*, 19.

III. Where decedent's estate in 1921 paid note at bank, on which decedent was accommodation endorser, and estate received stock certificates which had been pledged as collateral by maker of note, it was properly construed by Commissioner of Internal Revenue that the stock so received by the estate repaid the estate for the amount paid out, and is not to be allowed as a deduction in the determination of the estate tax; but the loss, if any, sustained by the estate on the stock so acquired, is a deduction properly to be allowed from income in the year in which the loss is sustained. *Id.*

IV. Where plaintiff in 1923 received 2,500 shares of stock as additional compensation and did not report same in his income tax return for that year, on the basis that it was a not closed transaction, he is estopped from claiming refund on his income tax for 1928 and 1929 based on

TAXES—Continued.

XI. Where a net gain or loss results from amounts distributed in liquidation of a corporation, under Section 115 of the Revenue Act of 1928, it has the same effect as a sale or exchange of capital assets and is to be treated as a capital gain or loss, under Section 101 of the Act. *H. T. White*, 125.

XII. Where Chicago brewery held saloon licenses which it had purchased prior to Prohibition Act of 1919, and 18th Amendment, and which became worthless by reason of these enactments, deduction of loss so sustained is allowable. *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638; *William Zakon* v. *Commissioner*, 7 B. T. A. 687; *McAvoy* v. *Commissioner*, 10 B. T. A. 1017 cited. *Clarke* v. *Haberle Crystal Springs Brewing Co.*, 280 U. S. 384 and *Renziehausen* v. *Lucas*, 280 U. S. 387, distinguished. *Elston*, 136.

XIII. A referee in bankruptcy, not being a judge of a "constitutional court," his compensation, which is indefinite, is subject to income tax. *Williams* v. *U. S.*, 289 U. S. 553; *O'Donoghue* v. *U. S.*, 289 U. S. 516. *Evans* v. *Gore*, 253 U. S. 245, distinguished. *Charles*, 168.

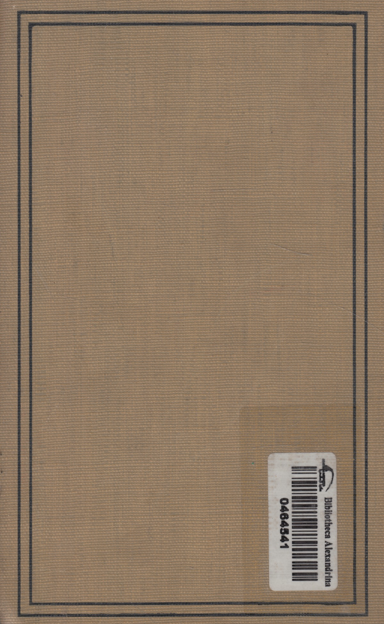
XIV. The rule in most jurisdictions, including the Federal courts, is that, in the absence of an agreement or consent to receive it as such, a promissory note of the debtor, although accepted by the creditor, does not in itself constitute payment or amount to a discharge of the debt. *Mellinger*, 272.

XV. The taking from debtors of separate new notes including past due interest, for which new or additional security is taken, does not constitute the receipt of taxable income by a taxpayer keeping her books on a cash basis. *Id.*

XVI. The taking of security for a preexisting debt does not constitute payment or discharge of the debt, and it follows that the taking of additional security does not constitute payment of the debt. *Id.*

XVII. Where rebates received in connection with contract for purchase of material were credited to the personal account of president of the corporation, who was owner of all of the capital stock of the corporation, said president is held to be liable for tax on such amounts as income. *Thomas*, 388.

XVIII. Where rebate checks were payable to corporation but were credited on corporation's books to the account of the president, they were not taxable to the corporation but to the president. *Id.*


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